1281

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1147.~~ 779

JOHN S. KIDD, PLAINTIFF IN ERROR,

vs.

I. E. PEARSON AND S. J. LOUGHRAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 10, 1887.

1—155

1887.

(653)

128-1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1147.~~ 779

JOHN S. KIDD, PLAINTIFF IN ERROR,

vs.

I. E. PEARSON AND S. J. LOUGHRAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 10, 1887.

accession 23859

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1147.

JOHN S. KIDD, PLAINTIFF IN ERROR,

vs.

I. E. PEARSON AND S. J. LOUGHRAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print.
Caption	*a*	1
Abstract of record	1	1
Petition	1	1
Amendment to petition	4	3
Answer	4	4
Order overruling motion for injunction	4	4
Evidence	5	4
(1)—Application for permit	5	4
(2)—Bond of applicant	5	5
(3)—Certificate of electors	6	6
(4)—Endorsement by Board	7	6
(5)—Permit	7	6
(6)—Stipulation as to permits	8	7
(7)—Monthly report as to liquors purchased and sold	8	7
(8)—Stipulation as to facts	9	9
(9)—Testimony of J. G. Rounds	9	9
Decree	11	10
Appeal	13	12
Acknowledgment of service of abstract	13	12
Submission	15	12
Opinion	16	13
Dissenting opinion	72	23
Final judgment	84	26
Petition for writ of error	86	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 10, 1888.

	Original.	Print.
Order allowing writ of error	96	29
Writ of error	97	29
Bond	98	30
Citation	100	31
Proof of service of citation	101	32
Assignment of errors	102	32
Exhibit A—Sections of the Code of Iowa	106	34
Clerk's certificate	112	39

a Pleas in the supreme court of the State of Iowa, in a cause therein tried and decided, entitled as follows:

"I. E. PEARSON and S. J. LOUGHRAN
vs.
THE INTERNATIONAL DISTILLERY and JOHN S. KIDD, Appellant." } No. 12885.

Be it remembered that on the 27th day of April, 1887, the appellant (now pl'ff in error) filed in the office of the clerk of the supreme court of Iowa, in conformity with the rules of said court, a printed abstract of record, the same, together with the endorsements thereon, being in the words and figures following, to wit:

1 *Appeal from the Decree of the District Court of Polk County.*

In the Supreme Court of Iowa. June Term, 1887. In Equity.

I. E. PEARSON and S. J. LOUGHRAN, Appellees,
vs.
INTERNATIONAL DISTILLERY and JOHN S. KIDD, Appellant.

Lehmann & Park, C. C. Nourse, and Geo. G. Wright, attorneys for appellant, John S. Kidd; L. Todhunter, Runnells & Walker, Cole, McVey & Clark, attorneys for appellee.

Appellant's abstract of record.

On the 24th day of December, 1885, the plaintiffs filed their petition in equity against the International Distillery and John S. Kidd in the office of the clerk of the circuit court of Polk county, Iowa. The petition is as follows:

The plaintiffs aver that they are citizens of Polk county, Iowa, and for many years have been citizens and residents of said county and State, and for cause of action say—

That the defendant distillery was and is erected on lots 1 and 2, original plat, Brooks' addition, Des Moines, that part of lots 59 and 55 and the west half of lot 56 of Brooks & Company's addition to the city of Des Moines, Iowa, lying on the north side of the
2 Chicago, Burlington & Quincy railroad's right of way through said lots, and containing eleven and seven one-hundredths acres of land, according to survey; also a strip or parcel of ground twelve feet wide off of the east end of lot 59, in said addition, all in the county of Polk and State of Iowa, and within the corporate limits of the city of Des Moines; that the said buildings, machinery, fixtures, vessels, and appliances were erected and are maintained for the manufacture of intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors—that is to say, the said defendant distillery was erected on the above-described premises,

and all its buildings, machinery, and fixtures, known and called the International Distillery, and that the object and purpose of said buildings, fixtures, and machinery, and of said distillery is now and was that of manufacturing and producing in large quantities intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors.

The plaintiffs further say that the said defendant distillery and the said John S. Kidd have been, since the fourth day of July, 1884, and are now, engaged by means of said buildings, machinery, fixtures, and appliances in the manufacture on said premises of intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors.

That the defendants have been, since the fourth day of July, 1884, and are now, engaged in the said manufacture of the said intoxicating liquors upon said premises for other than for mechanical, medicinal, culinary, and sacramental purposes, to wit, for use as a beverage. The defendants have been, since the 4th day of July, 1884, and are now, on said premises, and by means of said buildings, machinery, fixtures, and appliances engaged in the manufacture of said intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors, contrary to the laws of the State of Iowa and contrary to chapter 6, title 11, of the code of Iowa, and contrary to said chapter as amended by act of 1884 and as now in force.

The plaintiffs further say that the defendant and the said John S. Kidd have continually, since the 4th day of July, 1884, and are now, in said county of Polk and on said premises, and by means of said buildings, machinery, fixtures, and appliances, engaged in and are now violating the provisions of section 1525 of chapter 6 of title 11 of the code of Iowa and of the statutes of Iowa as amended; that the said buildings erected on said premises, the said grounds upon which said unlawful manufacture is carried on, as aforesaid described, the machinery, fixtures, vessels, and appliances aforesaid have become and are now a nuisance, to the great injury of these plaintiffs and many other citizens of Polk county, Iowa, and should be abated according to law, and that said grounds, buildings, fixtures, and appliances, unless abated and destroyed, will continue to be used for the said unlawful purposes and will remain and continue to be a nuisance.

The plaintiffs further say that the said defendant, John S. Kidd,
on the premises heretofore described, and by means of the
3 buildings aforesaid situated thereon, has been, since the 4th
day of July, 1884, and is now, engaged in owning and keeping, and is now engaged and concerned in owning and keeping, intoxicating liquors on said premises, with intent to sell the same in violation of the laws of the State of Iowa and for other purposes than those authorized by law.

The plaintiffs further say that since the 4th day of July, 1884, and now, the defendant, the said John S. Kidd, has been and is engaged on said premises, by himself, his officers, servants, and agents, in the unlawful sale of intoxicating liquors, to wit, alcohol, high wines,

cologne spirits, and other spirituous liquors, contrary to the laws of Iowa.

The plaintiffs say that by reason of the foregoing facts the said lands, buildings, machinery, fixtures, vessels, and appliances situated thereon have become and are a nuisance, to the great injury of these plaintiffs and many other citizens, and that the same should be abated and perpetually enjoined according to law.

The plaintiffs say that the violations of the law hereinbefore stated were committed as follows—that is to say:

The defendants manufacture, keep for sale, and sell within this State, and at the place aforesaid, intoxicating liquors to be taken out of this State and there used as a beverage, and for other purposes than for mechanical, medicinal, sacramental, and culinary purposes, contrary to the statute of Iowa.

Wherefore the plaintiffs pray that said premises be held and adjudged to be a nuisance; that the machinery, fixtures, vessels, and appliances situated thereon may be declared to be a nuisance; that the same may be abated and perpetually enjoined from ever being taken, held, used, or in any manner utilized for the purpose of manufacturing any and every kind of intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors; that the defendant, The International Distillery, by itself, its officers, servants, and agents, be perpetually enjoined from manufacturing any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors; that the said defendant company be perpetually enjoined from selling or keeping for sale, for other than the four purposes authorized by the laws of this State, any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors, and that the said John S. Kidd, by himself, his agents, servants, and assigns, be perpetually enjoined from manufacturing, selling, or keeping for sale any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors on said premises, and that the defendants and each of them, their agents, servants, and assigns, be enjoined perpetually from the manufacture of any and all intoxicating liquors upon said premises, and by means of said machinery, buildings, fixtures, and appliances, and that they and each of them, and their servants, agents, and assigns, be perpetually enjoined from selling or keeping for sale any and all intoxicating liquors on said premises whatever, and for judgment for costs, and all other equitable and proper relief.

4

(Signed) LEWIS TODHUNTER,
Plaintiffs' Attorney.

On the 29th day of December, 1885, the plaintiffs filed an amendment to their petition, verifying the same upon the affirmation of I. E. Pearson.

On the 19th day of January, 1886, the plaintiffs dismissed their cause of action herein as against the defendant, The International Distillery.

and all its buildings, machinery, and fixtures, known and called the International Distillery, and that the object and purpose of said buildings, fixtures, and machinery, and of said distillery is now and was that of manufacturing and producing in large quantities intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors.

The plaintiffs further say that the said defendant distillery and the said John S. Kidd have been, since the fourth day of July, 1884, and are now, engaged by means of said buildings, machinery, fixtures, and appliances in the manufacture on said premises of intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors.

That the defendants have been, since the fourth day of July, 1884, and are now, engaged in the said manufacture of the said intoxicating liquors upon said premises for other than for mechanical, medicinal, culinary, and sacramental purposes, to wit, for use as a beverage. The defendants have been, since the 4th day of July, 1884, and are now, on said premises, and by means of said buildings, machinery, fixtures, and appliances engaged in the manufacture of said intoxicating liquors, to wit, alcohol, high wines, cologne spirits, and other spirituous liquors, contrary to the laws of the State of Iowa and contrary to chapter 6, title 11, of the code of Iowa, and contrary to said chapter as amended by act of 1884 and as now in force.

The plaintiffs further say that the defendant and the said John S. Kidd have continually, since the 4th day of July, 1884, and are now, in said county of Polk and on said premises, and by means of said buildings, machinery, fixtures, and appliances, engaged in and are now violating the provisions of section 1525 of chapter 6 of title 11 of the code of Iowa and of the statutes of Iowa as amended; that the said buildings erected on said premises, the said grounds upon which said unlawful manufacture is carried on, as aforesaid described, the machinery, fixtures, vessels, and appliances aforesaid have become and are now a nuisance, to the great injury of these plaintiffs and many other citizens of Polk county, Iowa, and should be abated according to law, and that said grounds, buildings, fixtures, and appliances, unless abated and destroyed, will continue to be used for the said unlawful purposes and will remain and continue to be a nuisance.

The plaintiffs further say that the said defendant, John S. Kidd, on the premises heretofore described, and by means of the
3 buildings aforesaid situated thereon, has been, since the 4th day of July, 1884, and is now, engaged in owning and keeping, and is now engaged and concerned in owning and keeping, intoxicating liquors on said premises, with intent to sell the same in violation of the laws of the State of Iowa and for other purposes than those authorized by law.

The plaintiffs further say that since the 4th day of July, 1884, and now, the defendant, the said John S. Kidd, has been and is engaged on said premises, by himself, his officers, servants, and agents, in the unlawful sale of intoxicating liquors, to wit, alcohol, high wines,

cologne spirits, and other spirituous liquors, contrary to the laws of Iowa.

The plaintiffs say that by reason of the foregoing facts the said lands, buildings, machinery, fixtures, vessels, and appliances situated thereon have become and are a nuisance, to the great injury of these plaintiffs and many other citizens, and that the same should be abated and perpetually enjoined according to law.

The plaintiffs say that the violations of the law hereinbefore stated were committed as follows—that is to say:

The defendants manufacture, keep for sale, and sell within this State, and at the place aforesaid, intoxicating liquors to be taken out of this State and there used as a beverage, and for other purposes than for mechanical, medicinal, sacramental, and culinary purposes, contrary to the statute of Iowa.

Wherefore the plaintiffs pray that said premises be held and adjudged to be a nuisance; that the machinery, fixtures, vessels, and appliances situated thereon may be declared to be a nuisance; that the same may be abated and perpetually enjoined from ever being taken, held, used, or in any manner utilized for the purpose of manufacturing any and every kind of intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors; that the defendant, The International Distillery, by itself, its officers, servants, and agents, be perpetually enjoined from manufacturing any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors; that the said defendant company be perpetually enjoined from selling or keeping for sale, for other than the four purposes authorized by the laws of this State, any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors, and that the said John S. Kidd, by himself, his agents, servants, and assigns, be perpetually enjoined from manufacturing, selling, or keeping for sale any and all intoxicating liquors whatever, including alcohol, high wines, cologne spirits, and other spirituous liquors on said premises, and that the defendants and each of them, their agents, servants, and assigns, be enjoined perpetually from the manufacture of any and all intoxicating liquors upon said premises, and by means of said machinery, buildings, fixtures, and appliances, and that they and each of them, and their servants, agents, and assigns, be perpetually enjoined from selling or keeping for sale any and all intoxicating liquors on said premises whatever, and for judgment for costs, and all other equitable and proper relief.

4

(Signed) LEWIS TODHUNTER,
Plaintiffs' Attorney.

On the 29th day of December, 1885, the plaintiffs filed an amendment to their petition, verifying the same upon the affirmation of I. E. Pearson.

On the 19th day of January, 1886, the plaintiffs dismissed their cause of action herein as against the defendant, The International Distillery.

On the 26th day of January, 1886, the defendant, John S. Kidd, filed his answer in words and figures as follows:

1. Now comes the defendant, and, answering to the petition of plaintiffs herein, for his first defense denies each and every allegation therein contained.

2. For a further defense to said petition defendant says that he is now, and ever since the fourth day of July, A. D. 1884, has been, authorized by the board of supervisors to manufacture and sell intoxicating liquors, except as prohibited by law, and that in the manufacture and sale of liquors this defendant has at all times complied with the requirements of law in that behalf.

Wherefore he prays to be hence dismissed with his costs in this behalf expended.

(Signed) LEHMANN & PARK,
Attorneys for Defendant.

On the 2d day of December, 1886, the case came on to be heard on the application of the plaintiffs for a temporary injunction, and upon such application, after hearing the same, the court entered the following order, to wit:

This cause came on this day for hearing, upon motion of plaintiffs for a temporary injunction herein, the plaintiffs appearing by L. Todhunter, attorney, and the defendant appearing by Lehmann & Park, attorneys, and the court, having heard the argument of counsel and being fully advised in the premises, overruled such motion, to which ruling the plaintiffs excepted, and the cause will stand continued.

Afterwards, on the second day of February, 1887, the case came on for trial in the district court of Polk county, Iowa, before the Honorable W. F. Conrad, judge of the said court, and to sustain the issues on their part the plaintiffs offered the following testimony:

1. An application of John S. Kidd for a permit to manufacture, buy, and sell intoxicating liquors, which application is in words and figures as follows, to wit:

To the honorable board of supervisors of said county:

Your petitioner, John S. Kidd, a citizen of said State and a resident of said county, respectfully asks for a permit to manufacture, buy, and sell intoxicating liquors for medicinal, mechanical, culinary, and sacramental purposes in the buildings situated on lots 1 and 2, official plat of lots 55 and 56 of Brooks & Co.'s addition to the city of Des Moines, and in the city of Des Moines, in Lee township, in said county and State, and he avers that he is neither a hotel-keeper, keeper of a saloon, eating-house, grocery, nor a confectioner, and, in compliance with law, he herewith presents a bond in the sum of five thousand dollars, as required by the laws of Iowa, code of 1883, and amendments thereto.

(Signed) JOHN S. KIDD.

Subscribed and sworn to before me this 21st day of March, 1886.
[NOTARIAL SEAL.] (Signed) WM. A. PARK,
Notary Public, Polk County, Iowa.

2. Also a bond of said John S. Kidd, accompanying such application, as follows:

Know all men by these presents that we, John S. Kidd, as principal, and J. H. Merrill and Charles W. Rogg, as sure'ies, all of Polk county, Iowa, are held and firmly bound unto said county, for the uses and purposes by law prescribed, in the sum of five thousand dollars; for the payment of which, well and truly to be made, we do hereby, jointly and severally, bind ourselves, legal representatives and assigns, firmly by these presents.

The condition of this obligation is such that whereas the said John S. Kidd has filed his application with the auditor of said county for a permit to manufacture, buy, and sell intoxicating liquors, stating that he is doing business as a distiller at the
6 premises of the International Distillery, situated on lots 1 and 2, official plat of lots 55 and 56, Brooks & Co.'s addition to the city of Des Moines, Polk county, Iowa, under and in accordance with the laws of the State of Iowa, and asking that he may be granted a permit to manufacture, buy, and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes and in the manner prescribed by law at the place aforesaid:

Now, therefore, if the said John S. Kidd shall carry out all the provisions of all laws now or hereafter in force relating to the manufacture, purchase, and sale of intoxicating liquors, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Signed this twenty-first day of May, A. D. 1886, at Des Moines, Iowa.

(Signed) JOHN S. KIDD, *Principal.*
J. H. MERRILL, *Surety.*
CHAS. W. ROGG, *Surety.*

STATE OF IOWA, } ss:
Polk County, }

J. H. Merrill, Chas. W. Rogg each, being duly sworn, deposes and says that he is a resident and freeholder of the State of Iowa; that he is surety on the foregoing bond; that he is worth the sum of five thousand dollars beyond the amount of his debts; that he owns real property liable to execution and aside from encumbrances in the State of Iowa equal to five thousand dollars.

(Signed) J. H. MERRILL.
CHAS. W. ROGG.

Sworn to before me and subscribed in my presence by the said J. H. Merrill and Charles W. Rogg this 21st day of May, 1886.
[NOTARIAL SEAL.] (Signed) WM. A. PARK,
Notary Public, Polk County, Iowa.

3. Also a certificate of the electors of the seventh ward of the city of Des Moines, Polk county, Iowa, in words and figures following, to wit:

To the honorable members of the board of supervisors of Polk county, Iowa:

The undersigned, legal electors of the seventh ward of the city of Des Moines, Polk county, Iowa, do hereby certify that we are acquainted with John S. Kidd; that he is a citizen of the said county and State; that he is of good moral character, and we believe him to be a proper person to manufacture, buy, and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes in the buildings situate on lots one (1) and two (2), official plat of lots fifty-five (55) and fifty-six (56), Brooks & Co.'s addition to the city of Des Moines, Iowa.

(Signed by James Case and 393 others.)

7 4. Also the endorsement on the back of the said certificate in words and figures as follows, to wit:

Filed May 21, 1886.

BRUCE E. JONES, *Auditor.*

The within application coming on for final hearing this first day of June, it is hereby ordered that John S. Kidd be granted a permit for one year, as prayed for in this petition.

(Signed) S. B. TUTTLE, *Chairman.*

5. Also a permit to manufacture, buy, and sell intoxicating liquors, issued by said board of supervisors to John S. Kidd, which is in words and figures as follows, to wit:

Permit to Buy and Sell Intoxicating Liquors.

STATE OF IOWA, } ss:
Polk County, }

Whereas John S. Kidd did, on the 22d day of May, A. D. 1886, file with the auditor of said county his application for a permit to manufacture, buy, and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only at lots 1 and 2, official plat lots 55 and 56, Brooks & Co.'s addition to city of Des Moines, Lee township, in the city of Des Moines, in the county and State aforesaid, and did accompany the said application with the proper bond, with sureties, in the sum and conditioned as by law prescribed, which bond has been approved by the auditor of said county, and it appearing that said applicant is entitled to buy and sell intoxicating liquors for the purposes above named, and said auditor fixed the first day of June, A. D. 1886, for the final hearing of the said application by the board of supervisors of said county and gave notice thereof as by law prescribed, and, upon the final hearing of said application, the board of supervisors was fully satis-

fied that the requirements of the law have in all respects been fully complied with, and that said applicant is entitled to a permit, as in said application asked, upon consideration it is ordered that he be, and is hereby, permitted to manufacture, buy, and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only at the place aforesaid for the term of one year from this date.

In testimony whereof, and pursuant to an order of the board of supervisors of Polk county, Iowa, made on the first day of June, A. D. 1886, said board has caused these presents to be signed by its chairman and caused the seal of said county to be hereunto affixed.

[Official Seal of Polk County, Iowa.]

(Signed) S. B. TUTTLE,
Chairman Board Supervisors.

Attest: BRUCE E. JONES,
Auditor, Polk County, Iowa.

8 6. It was stipulated that a like permit to that hereinbefore set forth and upon like proceedings was granted to said John S. Kidd in the year 1884 and also in the year 1885.

7. Also all monthly reports to the county auditor of liquors manufactured and sold by John S. Kidd for the months from July, 1884, to January, 1887, both inclusive. Said reports are in the following form, differing only in dates, amounts, and names of purchasers, to wit:

Monthly Report of Intoxicating Liquors Purchased and Sold.

DES MOINES, IOWA, *December* 27, 1884.

To the county auditor of Polk county, Iowa:

The undersigned, having a permit to manufacture and sell intoxicating liquors under article 2, chapter 64, of the revision of 1860, and the acts amendatory thereto, respectfully reports his purchases, manufactures, and sales of intoxicating liquors since the date of his last report, as provided in section 3, chapter 65, laws of 1872, as follows, to wit:

Purchases.

Barrels.	Kegs.	Bottles.	Gallons.	Kind of liquor purchased.
				None.

Manufactured.

Barrels.	Kegs.	Bottles.	Gallons.	Kind of liquor purchased.
2,845				Crude alcohol.
2,550				Refined alcohol.

Sales.

Quantity of liquor sold.	Kind of liquor sold.	To whom sold.	For what purpose.
1,575 bbls.	Refined alcohol.	G. W. Kidd & Co., New York.	All for exportation outside of State of Iowa.
2,450 "	Crude alcohol.	G. W. Kidd & Co., New York.	
825 "	Refined alcohol.	E. S. Easton & Co., Peoria	
75 "	Crude alcohol.	Webb & Son, New York	
75 "	Refined alcohol.	Gallagher & Son, Philad'a.	

No liquors of any kind sold to any person in the State of Iowa.

9 *Kind and Quantity of Liquors Remaining on Hand at This Date.*

Barrels.	Kegs.	Bottles.	Gallons.	Kind of liquors.
211				High wines.
75				Refined alcohol.
300				Crude alcohol.

THE STATE OF IOWA, } ss:
Polk County, }

I, John S. Kidd, do solemnly swear that the foregoing report is true and correct in every particular as therein set forth, as I verily believe, so help me God.

JOHN S. KIDD.

Subscribed and sworn to by John S. Kidd before me this 30th day of December, 1884.

C. B. KAUFFMAN,
Notary Public.

8. The plaintiff also introduced the following stipulation, made by the parties for the purpose of this trial, to wit:

The defendant, to obviate the necessity of proof upon that subject, admits that the sales of liquors reported were made in the manner following: That he had an agent in the city of New York, who had authority to make sales; that agent would contract sales to Eastern parties residing and doing business without the State of Iowa, and forward his order to the defendant in this city for such sales, whereupon the defendant would ship to the purchaser, forwarding at the same time his draft for the amount of the shipment, with bill of lading attached, the liquors to be delivered to the purchaser, at his place of business without the State, on the payment of the draft; that all sales not made through this agency were made upon the orders of customers from without the State sent by mail or telegraph, and shipment was made to the persons ordering the liquors, and draft for the amount forwarded, with bill of lading attached, the liquors to be delivered to the purchaser, at his place of business without the State, on payment of the draft; and in these two modes all the liquors reported were sold.

9. Also J. G. ROUNDS, witness called on the part of the plaintiff, testified as follows:

I live in Des Moines and am cashier of the Citizens' National Bank; am acquainted with John S. Kidd. I know nothing about his sales of intoxicating liquors. He makes shipments to New York, on which we advance on drafts, with bill of lading attached. Our bank makes advances to him on bills of lading. He comes to us with a draft on a party in New York, and, in connection with the draft, presents a bill of lading attached to the draft. The bill of lading is for alcohol. We advance him the amount of the draft, less our charges for collection, and send the draft to our correspondent in New York, or whatever other place he is shipping to, for collection. The drafts have always been honored and paid when presented. We have taken drafts on other places than New York. We have taken them on Boston, a few on Philadelphia and San Francisco; none that I remember on St. Paul or Minneapolis; Albany, New York, is the only other place I remember of; possibly there have been one or two shipments made to Lowell. The drafts were in the usual form, payable at two or three days' sight. I do not recollect that there were any conditions annexed to the drafts. There were no conditions to the effect that merchandise would not be delivered until the bill was paid, unless it would be in our instructions in the matter. There were no conditions in the bill of lading. When Mr. Kidd comes to us with one of these drafts we pass it to his credit, less interest and exchange, and send the draft on. The draft ordinarily was at two or three days' sight. I don't remember that he ever drew any for as much as thirty, sixty, or ninety days. The longest time that I remember drafts to have been drawn upon is five days' sight, though the ordinary time is two or three days.

Cross-examination:

In these transactions we only took the ordinary risk we had on any draft with bill of lading attached. If the draft is not paid we are entitled to possession of the goods or recourse on Kidd, as we elect.

I don't know what the law would say to our acting merely as financial agents for Mr. Kidd. I give you the facts. We
11 charged him up for all the time the draft had to run and for all the expense of collection. If the draft should not be paid we have recourse upon him, or we have the bill of lading as a pledge for the goods.

We forward bill of lading with draft to our correspondent to collect for us. On payment to him the bill of lading is surrendered, except that in some cases the bill of lading is surrendered on acceptance of the draft. We do not assume to be wholesale dealers in intoxicating liquors. We have no license from the Government.

Redirect examination:

We have never discounted notes given by these persons to Mr. Kidd. I have no recollection of any such thing.

The foregoing was all the evidence offered or introduced on the trial of the said case, and the same was taken down in writing, and was, on the 14th day of March, 1887, certified by the judge trying the cause and made a part of the record in the case.

On the 14th day of March, 1887, the following decree was rendered in the cause, to wit:

Now, on this 14th day of March, 1887, this cause came on for final hearing before the court, the plaintiffs appearing by Lewis Todhunter, Cole, McVey & Clark, and Runnells & Walker, and the defendants by Lehmann & Park, and the court, being fully advised in the premises, and having heard all the proofs offered on said hearing and the arguments of counsel, finds that the defendant distillery was and is erected on that part of lot fifty-five (55) and the west half of lot fifty-six (56), in Brooks & Co.'s addition to the city of Des Moines, Iowa, lying on the north side of the Chicago, Burlington & Quincy Railroad Company's right of way through said lots, containing eleven (11) and seventy (70) one-hundredths acres of land, according to the survey, and also a strip or parcel of land twelve (12) feet wide off of the east end of lot fifty-nine (59), in said addition, all in the county of Polk and State of Iowa, and within the corporate limits of the city of Des Moines.

The court further finds that the plaintiffs were and are citizens of Des Moines, Iowa.

12 The court further finds that the said distillery consists of buildings, machinery, fixtures, furniture, movable property, vessels, and appliances for the manufacture of intoxicating liquors, and that the object and purpose of said buildings, appliances, and

fixtures aforesaid were and are the manufacturing and producing in large quantities intoxicating liquors.

The court further finds that the defendant, John S. Kidd, has been continuously since the 4th day of July, 1884, and is now engaged in the illegal manufacture, by means of the appliances aforesaid, of intoxicating liquors upon said premises, and that the said John S. Kidd has been during all said time and is now engaged in the manufacture of intoxicating liquors contrary to law.

The court further finds that since the 4th day of July, 1884, the said John S. Kidd, by means of the distillery and appliances aforesaid, has been and is now engaged on said premises, by himself, his officers, servants, and agents, in the unlawful manufacture of intoxicating liquors at said place, contrary to the laws of the State of Iowa.

The court further finds that the buildings erected upon said premises, in which the said manufacture has been carried on, and the machinery, fixtures, furniture, movable property, vessels, and appliances therein and used therefor have become and are now a nuisance and should be abated.

The court further finds that the defendant, John S. Kidd, has been, since July 4, 1884, engaged in the illegal manufacture of large quantities of intoxicating liquors, no part of which was used or required by the wants of the neighborhood or the locality in which said business has been carried on, and that the business of said Kidd, as conducted by him, was not necessary and proper for the accommodation of the neighborhood in which it was conducted.

It is therefore ordered, adjudged, and decreed, that the said John S. Kidd be perpetually enjoined from manufacturing on said premises any and all kinds of intoxicating liquors; that the defendant, the International Distillery, with its officers, servants, and agents, be perpetually enjoined from manufacturing any intoxicating liquors upon the said premises, and that the said John S. Kidd and the said International Distillery, and each of them, their servants, agents and assigns, be perpetually enjoined from manufacturing all intoxicating liquors upon said premises.

It is further ordered, adjudged, and decreed by the court that said nuisance be abated, and the sheriff of Polk county, Iowa, is hereby ordered to seize all fixtures, furniture, vessels, and movable property used on and about said premises in carrying on the said unlawful business, and that said sheriff move the same from said premises and sell the same in the manner provided for the sale of chattels under execution, and that he securely close the said buildings and distillery erected on said premises against the use or occupation of the same for the manufacture of intoxicating liquors.

13 It is further ordered, adjudged, and decreed that the proceeds of the sale of the said personal property shall be applied, first, in payment of the costs in this action and the abatement of said nuisance, and, secondly, to the satisfaction of the fines and costs adjudged against the said defendants and the keepers of said nuisance, and the balance, if any, shall be paid to the defendant, John S. Kidd.

It is further ordered, adjudged, and decreed that $—— be taxed as attorneys' fees in favor of plaintiffs' attorneys and that the defendants pay the costs in said cause; and said attorneys' fees and costs are declared to be a lien upon said premises, and that special execution issue therefor.

To all of which defendants except.

March 14, 1887.

(Signed) W. F. CONRAD, *Judge.*

On the 14th day of March, 1887, the defendants perfected an appeal to the supreme court of the State of Iowa by serving upon the plaintiffs and the clerk of the district court of Polk county, Iowa, a notice of appeal and filing a supersedeas bond in the penal sum of ten thousand dollars.

LEHMANN & PARK,
C. C. NOURSE, AND
GEO. G. WRIGHT,
Attorneys for Defendants.

(Endorsed.)

" DES MOINES, IOWA, *April 26th*, 1887.

We hereby acknowledge service of the within abstract and receipt of copies the day and date above written.

COLE, McVEY & CLARK,
RUNNELLS & WALKER,
Att'ys for Pl'ffs."

14 & 15 The cause was duly submitted on the foregoing record on the 28th day of June, 1887, and said court having considered the same and being fully advised in the premises, filed its decision thereof in writing on the 10th day of September, 1887, the same being of the regular June term, 1887, of said court, and said decision, together with the dissenting opinion of Justices Seevers and Read, is in the words and figures following, to wit:

16 In the Supreme Court. June Term, 1887.

I. E. PEARSON, S. J. LOUGHRIN
vs.
THE INTERNATIONAL DISTILLERY and JOHN S. KIDD, Appellant.

Appeal from Polk district court—Hon. W. F. Conrad, judge.

Action to declare a distillery a nuisance and to enjoin the manufacture, the selling, and keeping for sale therein of all intoxicating liquors.

A decree in accord with the prayer of the petition was rendered against defendant Kidd after a trial on the merits. He ap-
17 peals to this court.

Lehman & Park, C. C. Nourse, George G. Wright, for appellant; L. Todhunter, Runnells & Walker, Cole, McVey & Clark, for appellees.

BECK, *J.:*

I. The petition describes the lots — which the distillery named in the petition is situated, and alleges that it was erected and is used for the manufacture of intoxicating liquors for unlawful purposes, and that defendant now is engaged in the unlawful sale of such liquors in the premises described. It is alleged that "the defend-
ants manufactured, keep for sale, and sell, within this
18 State and at the place aforesaid, intoxicating liquors, to be taken
out of the State and there used as a beverage and for other purposes than for medicinal, mechanical, sacramental, and culinary purposes, contrary to the — State of Iowa."

Before answer the plaintiffs dismissed their action as against the International Distillery. Kidd answers the petition, denying all of its allegations. He also alleges that he is authorized by the board of supervisors to manufacture and sell intoxicating liquors, except as prohibited by law, and that he has, in the manufacture and sale
of liquors, complied with all requirements of the law.
19 There is no controversy as to the material facts of the case,
which are substantially as follows: The defendant during the time he has been engaged in operating the distillery has held a permit from the board of supervisors, regularly issued, authorizing him to manufacture and sell intoxicating liquors for mechanical, medicinal, culinary, and sacrimental purposes only, as prescribed by law. All liquors manufactured by defendant were disposed of in this manner. His agent would contract sales in New York and other cities outside of this State, and upon his order defendant shipped the liquor to the
purchaser, at the same time forwarding a draft attached to
20 the bill of lading, upon payment of which the liquors were
delivered to the purchaser. The monthly reports made by defendant in compliance with the requirements of the law show that the purposes of all sales made by him were for the exportation outside of the State of Iowa. These reports also contain this language: "No liquors of any kind sold to any person in the State of Iowa." It will be discovered that the showing is not entirely clear as to the place of sale. It is declared in the reports that the sales were "for exportation out of the State of Iowa." It is again said
that no liquors of any kind were sold in the State. It is
21 probable that the defendant means to say in his report that
the sales were made to persons outside of the State for the purpose of exportation from the State by the purchasers. It is clear that the purpose of the sale, as shown by his reports, was "exportation outside of the State of Iowa." It is perhaps of but little importance whether the sales were made in the State or out, or whether the purpose was for the defendant or the purchaser to export the liquors out of the State. It is very plain that the reports, as well as other evidence in the case, show that the sales made by defendant
were "all for exportation outside of the State of Iowa," and
22 that it is not shown in any way that the liquors were sold
for mechanical, medicinal, culinary, and sacrimental purposes, as authorized by law.

II. The sole question presented by the case is this: Under our statute may intoxicating liquor be manufactured in this State for transportation and sale beyond its boarders without regard to the purpose of its use; or, in other words, is the exportation out of the State a purpose for which intoxicating liquors may be lawfully manufactured and sold?

Counsel for defendants maintains that the statute of this State authorizes the manufacture and sale of intoxicating liquors
23 for exportation (transportation) out of the State without any restriction as to their use. This counsel for plaintiffs deny. The issue thus presented requires the interpretation of the statute of the State code, chapter 6, title XII, prohibiting the manufacture and sale of intoxicating liquors. Its consideration demands a careful statement of its provisions. Section 1523 declares that no person shall manufacture or sell * * * any intoxicating liquors, except as hereinafter provided, and the keeping of intoxicating liquor with the intent on the part of the owner thereof, or any person acting under his authority or by his permission, to sell the
24 same within this State, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance and shall be forfeited and dealt with as hereinafter provided.

It will be observed that this section prohibits the manufacture and sale of intoxicating liquors, except as permitted or authorized by the statute. The exception contemplated will be hereafter referred to. The second sentence of the section forbids the keeping of intoxicating liquors for sale within the State contrary to the prohibition of the statute. It does not forbid the keeping of liquors not intended to be so sold.

25 Section 1524 excepts from the operation of the statute sales "by the importer thereof of foreign intoxicating liquors imported under the authority of the laws of the United States" and remaining in the original casks or packages in which it was imported and sold therein. This section excepts, also, from the operation of the statute the manufacture of liquor in the State for mechanical, medicinal, culinary, and sacremental purposes.

Section 1525 provides penalties for the unlawful manufacture of intoxicating liquors, and section 1543 declares the premises in which intoxicating liquor is unlawfully manufactured or sold to be
26 a nuisance, which shall be abated as the law provides.

Section 1542 declares that "no person shall own or keep or be in any way concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this State, or to permit the same to be sold therein in violation of the provisions hereof." The section also prescribes penalties for the violation of its provisions.

Section 1526 is in the following language:

"Any citizen of the State, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners, is hereby
27 permitted, within the county of his residence, to [manufacture or] buy and sell intoxicating liquors for mechanical,

medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted."

Section- 1527–1538 prescribes the proceedings for procuring the permission provided for in sect. 1526, the duty of the person holding it, the causes and proceedings for revoking it, and other matters which need not be further referred to in this connection. Some of these sections, as well as section 1526, were amended by chapter 143,
Acts Twentieth Gen'l As., so that manufacturers of intoxi-
28 cating liquors to be used for lawful purposes are required to procure permits from the board of supervisors. We may here observe, and we shall have no occasion to again express the thought, that the amendments to the original statute made by the act just referred to cut no figure in the decision of the question before us. Under the original statute the manufacturer was not required to obtain a permit. Under the statute or amended statute he is; but, before the amendment as well as after, he could only manufacture for the lawful purpose prescribed by the statute; so in either case, if he manufactured liquor for other purposes, he was subject to the penalties prescribed, and his premises were a nui-
29 sance, subject to abatement under the statute.

It will be seen upon the careful consideration of the statute that intoxicating liquor may be manufactured and sold within the State to be used for mechanical, medicinal, culinary, and sacramental purposes, and for no other. We search in vain for any language in the statute in which any other purpose is contemplated.

Code, sect. 1524, declares that intoxicating liquors may be manufactured in this State "for the purpose of being sold, according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes." The evidence shows with-
30 out dispute that defendant manufactured intoxicating liquor "for exportation outside of the State of Iowa," and, pursuant to this purpose, it was not sold to any person in the State of Iowa.

The manufacture of liquor for exportation or transportation without the State is not excepted from the sweeping prohibition of code, sect. 1523. It is, therefore, unlawful. The question involving the interpretation of the statute now under consideration, so far as it rests upon the language of the enactment, is narrow and will admit of no prolonged discussion.

Arguments of counsel based upon other elements of inter-
31 pretation demand the careful consideration which we shall proceed to give them.

We will first express the opinion that the thought of counsel to the effect that intoxicating liquors may be lawfully manufactured under our statute for another or other purposes than the four expressly limited therein had its birth in the consideration of the language of the code, sect. 1523 and 1542, which forbid and provide punishment for the keeping of intoxicating liquor with the intent to sell the same within the State contrary to the statute. Under these sections intoxicating liquor under some circumstances may be kept in this State with the intent to sell it without the

State for any purpose—for purposes not lawful in the State; so under our statute the keeping of intoxicating liquors, under circumstances expressed therein, with intent to sell them without the State, is not unlawful. The provisions to this effect are necessary in order to harmonize with sect. 1524, which is intended to conform the statute to the doctrine of the United States Supreme Court, announced in Brown *vs.* The State of Maryland, 12 Wheaton, 419, and The License Cases, 5 Howard, 504, so that the statute should not conflict with the laws and authority of the United States.

Hence sect. 1524 provides that intoxicating liquors imported under the laws of the United States, while remaining in the original casks or packages, may be lawfully sold by the importer; but the original casks cannot be broken and the liquor sold in this State at retail for purposes forbidden by the statute. Thus imported liquor, while in the original packages, may be lawfully sold for transportation beyond the State without regard to the purposes for which it shall be used. It may be assumed that liquor not imported may be lawfully kept if there be no intent to sell it unlawfully within the State. This would be so as to liquors intended to be sold for lawful purposes and as to imported liquors.

It is claimed by counsel for defendant that this court has ruled that intoxicating liquors may be lawfully transported without the State. Niles *vs.* Frees, 35 Iowa, 41, and Becker *vs.* Betten, 39 Iowa, 668, are relied upon to support this claim. The question of authority under the law to transport from the State intoxicating liquors was in neither case. A little consideration of the language of the opinion in the first case will disclose the fact that it is in harmony with the views we have just expressed. It conveys the thought that liquor may be held within the State for lawful transportation without, and may be held for lawful sale in the State, which we have just held. The conditions which would make such transportation lawful are not stated as we have just now done. The argument did not demand such statement. In the next case the opinion declares, as to liquor manufactured in the State, that the right of export remains unlimited in the manufacturer and purchaser. If the word "export" was used in the opinion to mean transportation from the State to a sister State, a use which is hardly accurate, the language is not consistant with what we have just said; but the expression occurs *arguendo* and is not to be regarded as the announcement of a rule of the law. So, if it be assumed that language in conflict with our present views is found in the other case, it was used *arguendo* and not in expressing the decision of the court. The profession understand the difficulty, indeed, the absolute impossibility, of always expressing decision in language wholly accurate, and supporting them by arguments wholly sound, and it is understood that what is inaccurately said in a decision in argument like *obiter dicta* is not to be followed. Manly *vs.* Arenson, 25 Iowa, 383, and the State *vs.* Harris, 36 Iowa, 137, are cited by defendant's counsel in support of their position on this branch of the case. The first holds that intoxicating liquor is the subject of property, and the

other that the keeping of such liquor without intent to violate the law is not prohibited by the statute. We think neither case supports counsel's position.

But, let it be admitted that intoxicating liquors, under the provisions of the statute, may be kept in the State for transportation and sale beyond the State, it does not follow that liquor may be manufactured in the State to be disposed of in the same way. The
38 statute declares that it may be manufactured for the purpose of sale under the restrictions imposed therein. There is no provision of the statute which by fair construction authorizes its its manufacture for exportation.

III. Counsel for defendant urge that the construction of the law for which they contend having been so generally acquiesced in by the people and approved and advocated by the members of the General Assembly in legislative proceedings, by business organizations and the like, it all amounts to a contemporaneous interpretation, which should be followed by this court. The facts upon which counsel base their claim of contemporaneous interpre-
39 tation they draw from the public history as they understand it, in which, however, we do not concur. We understand, even from counsel's argument, that there were conflicting views upon the subject, and that there was not such a general concurrence of the profession of individuals composing the different departments of the Government and of the people generally as would give thereto the weight and force of contemporaneous construction.

As evidence of this contemporaneous interpretation counsel state as a fact that since the enactment of the statute distilleries
40 have been built in six of the cities of the State, which are named, and no attempt to enforce the statute against any of them was made until this action was brought. It is unfortunately true that in these cities, with the exception of Des Moines, where defendant's distillery is situated, no successful attempt has been made, unless it be recently, to enforce any of the provisions of the prohibitory statute. The violators of the law have been secure from prosecutions, and in some of them, if not all, have been licensed by the municipal government. It is a noteworthy fact that counties of the State wherein the prohibitory law is and has
41 been enforced and the law-abiding and loyal sentiment of the people secures the enforcement of this and all other criminal statutes are not mentioned by counsel as the places where distilleries have been erected. The inference is warranted that those who build and operate distilleries avoid these counties and seek the cities, where they may obtain immunity from prosecutions through the spirit of opposition to the law which sets it at defiance. Surely these considerations strip the facts stated by counsel and the arguments based therein of all force in support of their position, which, in effect, is that the statute is to be interpreted not to forbid the
42 manufacture of liquor for exportation for the reason that it has been and continues to be violated.

IV. Counsel contend that the statute is in effect repealed by *non usu*—that is to say, it has been so long without enforcement it is ob-

solete. Surely it will not do to hold that this statute, though not enforced, ceases to have due force of law. There are many criminal statutes of the State which are often violated, under which there have never been prosecutions of which we have heard, though they have been in force for a great many years. It would surely aston-
43 ish the profession should it be announced that these statutes cease to have the force of law through *non usu*. We know of no principle which supports such doctrine.

Hill *vs.* Smith, 1 Morris, 95, is cited in support of counsel's position, now under consideration. It was held in that case that an old United States statute was inoperative and repealed by *non usu* by the enactment of other irreconcilable statutes and by the establishment of an opposite legislative policy. It is not said that the statute was repealed by *non usu* alone, and it cannot be presumed that the court intended to present such a thought. *Non usu* indicated the
44 purpose of repeal by conflicting statutes and the recognition of opposite legislation policy. Thus far *non usu* was an element upon which to base the conclusion that the statute was repealed.

V. Counsel for defendant maintain that if their interpretation is not correct then the law is invalid, on the ground that it is in conflict with the exclusive constitutional right of Congress to regulate commerce among the States.

Counsel's position, as we understand it, is this: The statute, under the interpretation we adopt, forbids the manufacture of intoxicating liquors for the purpose of transportation and sale out of the
45 State, while its manufacture for sale for lawful purposes is authorized. Its manufacture for permitted purposes being lawful, it is a proper subject of property and of commerce. The statute in forbidding its transportation interferes with interstate commerce, and is a regulation thereof which, under the Constitution, is exclusively within the authority of Congress. We think brief consideration will serve to point out the error of this position.

The statute, as we interpret it, authorizes the manufacture of liquors for permitted purposes and forbids it for all other purposes. It does not forbid the transportation of liquors out of the
46 State. See code, sect. 1553 and amendment thereto, by chap. 143 Acts Twentieth Gen'l Ass. The prohibition of the statute is directed alone to the manufacture of intoxicating liquors for purposes other than for sale, according to the provisions of the statute. Code, sect. 1524. If the law be obeyed no liquor will be manufactured for transportation. Its operation is to prevent the production of an article which might be lawfully transported out of the State. Now, commerce consists in the interchange of commodities or property which is the subject of trade. It does not consist
47 of the impossible interchange of things not in existence. There must be articles of trade before commerce can exist. How, then, can it be said that the statute by prohibiting the manufacture of an article of trade regulates commerce?

But if this view be not correct, and the authority to regulate commerce extends to the regulation of the production of articles of

commerce, then is the State deprived of all authority *of* tax, license, prohibit, or otherwise regulate the manufacture and the manufactories of all articles which are intended when produced to be the subject of interstate commerce. One illustration will serve
48 to show the effect of the doctrine to broaden the exclusive authority of Congress to regulate commerce. A manufactory of steam boilers for sale or transportation without the State is established within the residence portion of a city of this State with dwellings of citizens adjacent thereto. Now, under the doctrine advanced by counsel, as the purpose of the owner of the manufactory is to produce articles for interstate commerce, the nuisance cannot be abated under the laws and authority of the State for the reason that the abatement would be the enforcement of regulations of commerce—a subject exclusively within the authority of
49 Congress. Surely it will not be contended that the authority of Congress reaches to this extent, but it may be urged that the boiler manufactory, according to the conditions of the illustration, is, under the laws of the State, a nuisance—a thing doing injury to people of the State by interfering with their comfortable enjoyment of property, and may, therefore, be abated by the statute. The same things are true of a distillery which, under the laws of this State, is a nuisance. These thoughts need not be extended. They lead to the conclusion that counsel's position upon this branch of the case is unsound

VI. It is admitted on all hands that if the statute in ques-
50 tion was enacted in the rightful exercise of the police power of the State it is valid. It is not important that we should here attempt to define what is called the police power or inquire into its extent. It is sufficient to say that it is a power which may be exercised by the State to secure, promote, and protect the wellfare, comfort, peace, and good morals of the people of the State. We need not make extended inquiry whether this power may be exercised to restore like benefits and protection to the people of sister States. It would seem, indeed, that, in view of the intimate relations of the people of the several
51 States—being in fact one people, the subjects of one general government, with common interests for good government and prosperity of all—the State should in its legislation have regard to the peace, prosperity, comfort, and good morals of all the citizens of the Union. Surely the State ought not to permit things to be done within its borders which subvert the peace, prosperity, and good morals of the people of other States. No one will doubt that it is not only within the authority of the State to suppress conspiracies and combinations within her borders intended to disturb
52 the peace of a sister State, but that it ought to do so; and surely even counsel for defendant will not contend that the power of the State may not be exerted to prevent the impairment of the health or good morals of the people of another State by the pursuit of business or by acts done within our own State. Will it be for a moment contended that the State cannot suppress the publication of obscene literature intended to be circulated exclusively

in other States? Or may it not prohibit the manufacture within the State of unwholesome food for transportation and sale in other States? Not alone do the true doctrines of constitutional
53 law deny that the power of the State is so restricted; humanity, patriotism, interstate comity, and christianity all unite in protest against it.

VII. But if it be assumed that the police power of the State may be exercised to secure benefits and protection to the State alone the prohibition of the statute in question, as we interpret it, finds ample support in the demand for protection of our people from the evils which would flow from the unrestricted manufacture of intoxicating liquors. It is proper to remark here that this power may not be arbitrarily or capriciously exercised, and never for purposes
54 other than the protection of the people and the suppression of evils threatening the subversion of the peace, comfort, and good morals of the people and their quiet and full enjoyment of property.

The evils flowing from intoxicating liquor arise wholly from its use as a beverage; but this use is widespread, reaching all classes of the people and both sexes and every age. No condition of life is wholly exempt therefrom.

An enumeration of all the evils arising from the use of intoxicating liquor need not be attempted. They are numerous and effect the people collectively and individually. Idleness,
55 poverty, pauperism, crime, insanity, disease, and the destruction of human life follow indulgence in the habits of using intoxicating drinks. Millions of our fellow-countrymen are addicted to this habit, and of those millions become drunkards. Homes are broken up and domestic peace is destroyed by drunkenness. The prisons, almshouses, and institutions for the care of orphanage, insanity, and affliction are largely filled by the vice. These are evils, but not all of the evils, of the alcohol habit affecting the social condition of the people and their comfort and good morals.

But other evils attending the use of intoxicating beverages
56 affect the State and its government. It is the prolific source of crime, pauperism, and insanity and thereby entails taxation to defray the expenses of the conviction and punishment of criminals and the support of almshouses, asylums, and hospitals. It deteriorates mentally and physically the human stock, rendering its victims as well as their progeny less capable of bearing arms in defense of their country and of discharging other duties of the citizens. Soldiers are unfitted for duty by it, and thereby battles have been lost and the liberty of nations, if not lost, have been imperiled.

Tradition perpetuates, if history does not fully record, the
57 evils which have flowed from the alcohol habit of officers and soldiers of our own armies. Washington struggled with difficulties occasioned by it, and other commanders of later days have had a like experience, while patriotic soldiers have suffered on account of inebriety of officers in all branches of the military service.

The appetite for strong drink, possessed by so many of our countrymen, demands constant gratification and the expenditure therefor of *erroneous* sums of money, thus creating a business, the keeping of saloons and dramshops, in which are employed an immense number of men. Their business and their relations with the
58 idle and dangerous classes of society give them great influence in public affairs. The municipal governments of the cities, often burdened with debts and robbed by unfaithful and mercinary officers in all departments, give evidence of the direction in which this influence exerted. Thinking men of this day largely concur in the opinion that the influence of the saloon and the idleness and vice of the multitude of its clientage united constitute the great peril of American institutions. We think none will deny that nothing but evil flows from this source.

59 That the State possesses the power in the exercise of its police authority to strike at the alcohol habit by regulating or totally suppressing the sale of intoxicating liquors for use as a beverage is admitted on all hands. We do not understand that counsel for defendants deny it. All the courts of the Union, Federal and State, which have passed upon the question unite in sustaining this authority. See for a citation of these cases Cooley's Constitutional Limitations, 582–'3 and notes, and the first series and annual volumes of the United States Digest.

The power to prohibit the sale of intoxicating liquors has
60 been exercised by many States, and traffic therein with Indians has been prohibited by statutes of the United States and of this and other States. The preservation of order in the Indian tribes and peace between them and the frontier settlers, the prevention of famine and disease, and the preservation of the very existence of these savages are the humane objects of these statutes. The same purpose demands legislation to protect the inebriates of our country—men, probably, equaling in number all the Indian tribes—from the destructive consequences of the gratification of their appetites for strong drink, which is no less uncontrol-able in them than in the Indians. Surely humanity and patriotism de-
61 mands that the same protection be extended to this unfortunate class of citizens of the United States which is secured to the savage wards of our Government.

In the exercise of the power to suppress saloons and prohibit the sale of intoxicating liquors as a beverage the Legislature of this State, in the constitutional exercise of its discretion, has forbidden the manufacture of intoxicating liquors except for sale for mechanical, medicinal, culinary, and sacramental purposes under regulations as prescribed by the statute. The prohibition of the manufacture is a means to effectuate the prohibition of the sale. The
62 use of all means to accomplish the end not forbidden by constitutional restriction rests in the discretion of the legislative department of the State government. The courts cannot review the exercise of this discretion.

VIII. But the prohibition of the manufacture of intoxicating liquor may be supported upon the ground that, *per se*, it has a deli-

terious effect upon good order and the peace, comfort, and morals of the people of the State. The manufacture of an article so pernicious in its use as a beverage cannot be consistently authorized while its sale is forbidden. It would be as an effort to stay the flow
63 of a stream when its very source should be destroyed.

The manufacture in the State would offer inducements for the violation of the law prohibiting sales, and would afford opportunities for the creation and gratification of the appetites by at least those engaged in and connected with it. For other reasons, which need not be stated, the Legislature esteemed the manufacture to be an evil which ought to be suppressed.

IX. But counsel insist that alcohol, which was alone manufactured by defendant, is not commonally used as a beverage. The statement may be admitted to be true, but it is largely so used by people
64 of some nationalities who have become citizens of the United States and often used by others. By the simple process of dilution of alcohol a beverage is made palatable enough to the victims of the appetite for strong drink, which may become the common drink of inebriates.

X. Counsel argue, as we understand them, that, as the manufacture of alcohol is permitted for sale for lawful purposes within the State, it does, when manufactured for exportation, not a lawful purpose, become property, and then its exportation, a purpose forbidden by the statute, becomes lawful on the ground that the re-
65 striction upon its use is an interference with the rights of property; but, conceeding that alcohol, without regard to the purpose of its manufacture, is property, it does not follow that its uses may not be restricted by the State in the exercise of its police authority. While the State may not deprive the citizens of his property, it may forbid its use for purposes which are subversive of the peace, order, and morals of the people and destructive of health and life. Counsel refer to statutes forbidding the manufacture of oleomargarine and glucose, and express the opinion that they are not in conflict with constitutional provisions upon which they
66 rely to defeat the statute under consideration in this case.

We can discover no distinction between the statute under consideration and the statute referred to by counsel, which are doubtless based on the ground that the articles prohibited are detrimental to health or their production is in conflict with the interests of the people and the policy of the State enacting them.

XI. But the use of property may be restricted for purposes connected with trade and other interests of the people. An illustration of legislation of this character is found in our game law,
67 which forbids the transportation out of the State of any game killed within it, yet the killing of game is permitted with restrictions as to time any quantity or number killed. The sportsman may lawfully kill the prescribed number within the lawful time. The game becomes his property, yet he cannot transport it out of the State. We have never heard doubts expressed as to its constitutionality. A little consideration will disclose its close similarity to the statute forbidding the transportation of intoxicating liquor.

XII. The defendant insists that, as there is no evidence tending to show that he was the owner of the distillery and the ma-
68 chinery and movable property connected with its operation, the decree erroneously directs the closing of the distillery and the sale of the personal property to satisfy the costs of the action. There is no claimant of the property adverse to defendant, and no question is shown to have arisen in the court below involving the ownership of the property. The evidence establishes the fact that a nuisance was maintained in the building and the personal property was used in the violation of the law. The statute provides that when a nuisance is established in an action the personal property used about the premises shall be subject to sale
69 upon the judgment. (See Acts 21st Gen'l Ass., chap. 66, sect. 5.) If defendant owns the property or it has been used with the consent of the owner for the purpose of the violation of the statute, it is subject to be dealt with as provided by the statute. If it is not so owned or has not been so used the owner's rights are not precluded by the decree, and he will be protected in proper proceedings which he may institute for that purpose. As no prejudice can result to any one from the decree, there is no ground for changing its provisions in this regard.

70 XIII. Defendant further insists that the decree errs in directing the distillery to be closed. The defendant bases this claim upon the ground that he holds a permit to manufacture liquor for lawful purposes, and the decree destroys his rights thereunder. But the court rightly found under the evidence that defendant maintained a nuisance by manufacturing liquor contrary to law. His permit is no protection against the penalties provided therefor. Having been found a violator of the law, the court will not presume that he will hereafter obey the law. He makes no claim or promise that he will hereafter conduct his business lawfully.
71 The violation of the law works a forfeiture of his permit. For these reasons the decree correctly directs the closing of the distillery; at all events, it is in accord with the statute. If defendant is a lessee of the premises the lessor may obtain possession of the property by complying with the requirements of the statute. (Acts 21 Gen'l Ass., chap. 66, sect. 5.)

He suffers no prejudice from the decree.

We have considered all questions arising in the case, and reach the conclusion that the decree of the district court ought to be affirmed.

72 SEEVERS, *J.*, dissenting:

I do not understand it to be claimed in the foregoing opinion that there is any provision of the statute which in words forbids the manufacture of intoxicating liquors for sale out of the State for purposes which are unlawful if the sale was made in this State. If there is no such provision of the statute, then the right to transport the liquor for sale out of the State necessarily exists.

I do not understand it to be claimed by the majority of the court that there is any distinction between the seller and manufact-

urer, but that both are placed by the statute on the same footing. It is true it is stated in the opinion of the majority that "There is no provision of the statute which by fair construction authorizes its manufacture for exportation." This, it seems to me, is not a fair statement of the question to be determined, which is whether there is any provision of the statute which in terms or by fair construction forbids the transportation of liquors for sale beyond the boundaries of the State. Unless there is such a statute the right clearly exists, although there may not be an affirmative statute declaring the existence of such right. A statute which simply declares that liquors cannot be manufactured or sold except for certain specified purposes is not sufficient, for the reason that it does not by necessary implication apply to the manufacture of liquors for sale out of the State.

Therefore it seems to me the logic of the foregoing opinion is faulty; especially is this so where the prior discussions of this court are concerned. In Niles *vs.* Frees, 25 Iowa, 41, it is said by Beck, J., speaking for the court: "Intoxicating liquors in the possession of a citizen, who holds them for the purpose of selling them unlawfully within the State, or for transporting them without the State for lawful tra-fic, are not subject to seizure. Code, sect. 1525. To constitute the owning and keeping of intoxicating liquors unlawful, there must exist an intent to sell or dispose of them within the State contrary to law. In the absence of such intent the possession of this kind of property is lawful. If lawful, the law must protect the property." This decission was made in 1872, and Becker *vs.* Bitten, 39 Iowa, 668, was decided two years later, in which Cole, J., speaking for the court, said: "Further than this, the right to *export* remains unlimited to the manufacturer and purchaser." The italics are mine. Such was the construction placed on the statute by this court twelve or more years ago. Six sessions of the Gen'l Ass. have since then been held, and it must be assumed the members of the Gen'l Ass. are conversant with the decissions of this court construing the statutes of the State, and yet no amendment thereto was made, as is conceded by the majority, which changes the statute so as to avoid the construction adopted in the foregoing decissions. During the same period the distillery in question was in daily operation within sight of the capitol, and it was regarded, by at least some of the citizens of the State, as an outrage, and that its existense was unlawful—at least at four of the sessions of the Gen'l Ass. the prohibitory law was in some respects amended.

During such period hundreds of barrels of alcohol were annually manufactured at the distillery, sold and transported from the State, and yet no attempt was made, I believe—existed about the time this proceeding was commenced—to have such manufacture and sale declared unlawful. This fairly, I think, shows a contemporaneous construction of the statute by this court, acquiessced in by the Legislature and people, and therefore the language used in the foregoing decissions cannot at this late day be regarded as inaccurate expressions of judicial thought, or that it is mere

dictum. Besides this, in my opinion, it cannot be fairly said that the language used was not applicable to the question actually determined. It, therefore, seems to me that the construction of the statute, now for the first time adopted, is an after-thought. It cannot be fairly said that during the period mentioned public sentiment in
79 the county of Polk was opposed to the enforcement of the prohibitory law, whatever may be the fact as to other counties in the State. In all cases where the proper construction of a statute has been in force for several years the contemporaneous construction thereof by the people, courts, and Legislature, either by acquiescance or otherwise, is entitled to great consideration if the terms of the statute make its construction doubtful and uncertain.

In my opinion, the statute was properly construed by this court years ago, and that, as an original proposition, such construction is right. This depends wholly upon the construction that should be
80 given to sect. 1523 of the code; this in substance is conceeded by the majority. The other sections of the code referred to are mere make-weights, which favor or deduct from the construction placed upon sect. 1523 in the foregoing opinion. Now, what is the scope and object of the statute? The manufacture and sale of intoxicating liquors, except for lawful purposes, is forbidden. But where is the sale forbidden? In this State, of course; such is the express language of the statute. It will not be claimed, I assume, if a person sells in another State intoxicating liquors that he can be punished in this State, or that the statute makes such sale
81 unlawful. Mr. Kidd, therefore, when he sold alcohol in New York or in this State for shipment to and use in that State did no act which is forbidden by the laws of this State. It will be observed that it is conceeded by the majority that it is immaterial whether the sale was made out of this State or within the State for transportation and use out of it. If the sale is not unlawful how can the manufacture be unlawful when both by the statute are placed on precisely the same basis, as I think must be conceded to be the logical result of the foregoing opinion.

In my judgment, the plain and only meaning of the statute is
82 that the sale in this State and the manufacture for sale and use in this State of intoxicating liquors for unlawful purposes are alone prohibited, and that the statute does not undertake to say what may be done with the liquor in another State. If it did, a question would be presented as to the validity of the statute. Therefore the right to sell and transport liquor from the State exists simply because it is not prohibited. In my opinion, the construction of the statute adopted by the majority makes a conflict between it and the Constitution of the United States, and therefore
83 the fifth paragraph of the foregoing opinion is unsound. As long as intoxicating liquors and corn are regarded as property the right to transport either out of the State exists, although the avowed use of the corn so shipped is the manufacture of such liquors in another State. I also desire to reserve to myself the right hereafter to determine the extent of the police power inherent in the State.

As an individual I cordially assent to all that is said in the opinion of the majority as to the evils of intemperance; but I have doubts as to its materiality in the determination of this controversy.

The judgment of the district court should be reversed.

Reed, J., concurs in this dissent.

84 And on the same day said supreme court rendered a final judgment in said cause, which judgment, being duly recorded, is in the words and figures following, to wit:

I. E. PEARSON and S. LOUGHRAN
vs.
THE INTERNATIONAL DISTILLERY an- JOHN S. KIDD, Appellant. } No. 12885.

Appeal from Polk district court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court, Justices Seevers and Reed dissenting.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

85 It is further considered by the court that the appellant, John S. Kidd, pay the costs of this appeal, taxed at 63.75 dollars, and that execution issue therefor.

And afterwards, to wit, on the 20th day of September, 1887, there was lodged in the office of the clerk of the supreme court of Iowa a petition for writ of error, said petition, with the endorsemements thereon, being in the words and figures following, to wit:

86 UNITED STATES OF AMERICA, *State of Iowa:*

To the Honorable Austin Adams, chief justice of the supreme court of Iowa:

The petition of John S. Kidd respectfully shows that on the 10th day of September, 1887, a final decree was rendered against your petitioner in the supreme court of Iowa as follows:

I. E. PEARSON and S. J. LOUGHRAN, Appellees,
vs.
THE INTERNATIONAL DISTILLERY and JOHN S. KIDD, Appellant. } No. 12885.

Appeal from Polk district court.

87 In this caus-, the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court, Judges Seevers and Reed dissenting.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procе-ndo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $—, and that execution issue therefor.

The judgment or decree of the said district court so affirmed was as follows:

Now, on this 14th day of March, 1887, this cause came on for final hearing before the court, the plaintiffs appearing by Lewis
88 Todhunter, Cole, McVey & Clark, and Runnells & Walker, and the defendants by Lehman & Park, and the court being fully advised in the premises and having heard all the proofs offered on said hearing and the arguments of counsel, finds that the defendant distillery was and is erected on that part of lot fifty-five (55) and the west half of lot fifty-six (56), in Brooks & Co.'s addition to the city of Des Moines, Iowa, lying on the north side of the Chicago, Burlington & Quincy Railroad Company's right of way through said lots, containing eleven (11) and seventy (70) one hundredths acres of land, according to the survey, and also a strip or parcel of land twelve (12) feet wide off of the east end of lot fifty-nine (59), in said addition, all in the county of Polk and State
89 of Iowa and within the corporate limits of the city of Des Moines.

The court further finds that the plaintiffs were and are citizens of Des Moines, Iowa.

The court further finds that the said distillery consists of buildings, machinery, fixtures, furniture, moveable property, vessels, and appliances for the manufacture of intoxicating liquors, and that the object and purpose of said buildings, appliances, and fixtures aforesaid were and are the manufacturing and producing in large quantities intoxicating liquors.

The court further finds that the defendant, John S. Kidd, has been continuously, since the 4th day of July, 1884, and is now engaged in the illegal manufacture, by means of the appli-
90 ances aforesaid, of intoxicating liquors upon said premises, and that the said John S. Kidd has been, during all said time, and is now engaged in the manufacture of intoxicating liquors contrary to law.

The court further finds that since the 4th day of July, 1884, the said John S. Kidd, by means of the distillery and appliances aforesaid, has been and is now engaged on said premises, by himself, his officers, servants, and agents, in the unlawful manufacture of intoxicating liquors at said place, contrary to the laws of the State of Iowa.

The court further finds that the buildings erected upon said premises in which the said manufacture has been carried on, and the machinery, fixtures, furniture, moveable property, vessels, and appliances therein and used therefor, have become and are now
91 a nuisance and should be abated.

The court further finds that the defendant, John S. Kidd, has been, since July 4, 1884, engaged in the illegal manufacture of large quantities of intoxicating liquors, no part of which was used or required by the wants of the neighborhood or the locality in which

said business has been carried on, and that the business of said Kidd as conducted by him was not necessary and proper for the accommodation of the neighborhood in which it was conducted.

It is therefore ordered, adjudged, and decreed that the said John S. Kidd be perpetually enjoined from manufacturing on said premises any and all kinds of intoxicating liquors; that the defendant, the International Distillery, with its officers, servants, and
92 agents, be perpetually enjoined from manufacturing any intoxicating liquors upon the said premises; and that the said John S. Kidd and the said International Distillery, and each of them, their servants, agents, and assigns, be perpetually enjoined from manufacturing all intoxicating liquors upon said premises.

It is further ordered, adjudged, and decreed by the court that said nuisance be abated, and the sheriff of Polk County, Iowa, is hereby ordered to seize all fixtures, furniture, vessels, and movable property used on and about said premises in carrying on the said unlawful business, and that said sheriff move the same from said premises and sell the same in the manner provided for the sale of chattels under execution, and that he securely close the said build-
93 ings and distillery erected on said premises against the use or occupation of the same for the manufacture of intoxicating liquors.

It is further ordered, adjudged, and decreed that the proceeds of the sale of the said personal property shall be applied, first, in payment of the costs in this action and the abatement of said nuisance, and, secondly, to the satisfaction of the fines and costs adjudged against the said defendants and the keepers of said nuisance, and the balance, if any, shall be paid to the defendant, John S. Kidd.

It is further ordered, adjudged, and decreed that $—— be taxed as attorneys' fee- in favor of plaintiffs' attorneys, and that the defendants pay the costs in said cause, and said attorne-s' fees and costs are declared to be a lien upon said premises, and that
94 special execution issue therefor.

To all of which defendant excepts.

March 14, 1887.

(Signed) W. F. CONRAD, *Judge.*

All of which will appear by the records and proceedings in said cause.

Your petitioner shows that said judgment was rendered by the supreme court of the State of Iowa in a certain cause wherein L. E. Pearson and S. J. Loughran were plaintiffs and appellees and the International Distillery and your petitioner were defendants and your petitioner appellant, and that said court is the highest court of said State in which a decision in said suit could be had, and your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under sec.
95 709 of the Revised Statutes of the United States because in the said suit your petitioner claimed the right to manufacture alcohol at and upon the premises hereinbefore described and ship the same to other States and countries, and the decision of the State

court thereon was adverse to your petitioners, and in said suit was drawn in question the validity of a statute of the said State on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity; all of which appears by the record and proceedings in said cause.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and
96 for citation and supersedeas; and your petitioner will ever pray, etc.

JOHN S. KIDD, *Petitioner*,
By LEHMAN & PARK,
C. C. & C. L. NOURSE, AND
GEO. G. WRIGHT,
His Attorneys.

Having considered the foregoing petition, I hereby certify that the supreme court of Iowa is the highest court of law or equity in said State in which a decision of said case could be had, and that there is involved in said case a Federal question, to wit, the question of the validity of a statute of said State on the ground of its repugnance to the laws and Constitution of the United States, and the decision was in favor of such its validity, and the writ of error is therefore allowed as prayed.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

97 And on the same day there were filed in the office of the clerk of said court a writ of error, bond and citation, and assignment of errors, and the same are hereto attached, following in the order named, in original form, and are made a part of this transcript, and true copies of said writ of error, bond, and citation remain lodged in said clerk's office.

97½ UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, being the highest court of law or equity of said State in which a decision could be had in the said suit between I. E. Pearson and S. J. Loughran, plaintiffs & appellees, & John S. Kidd, defendant and appellant, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said John S. Kidd, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of the term, beginning on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of September, A. D. 1887.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk U. S. C. C., Dist. of Iowa.

Allowed,
AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] 12885. John S. Kidd *v.* I. E. Pearson *et al.* Writ of error. Filed Sep. 20, 1887. G. B. Pray, clerk sup. court.

98 UNITED STATES OF AMERICA, } ss:
State of Iowa, }

Know all men by these presents that we, John S. Kidd, as principal, and J. G. Rounds and C. W. Rogg, as sureties, are firmly held and bound unto I. E. Pierson and S. J. Loughran in the full and just sum of ten thousand dollars, to be paid to the said I. E. Pierson and S. J. Loughran, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of September, in the year of our Lord one thousand eight hundred & eighty-seven.

Whereas lately at a session of the supreme court of the State of Iowa, in a suit depending in said court between I. E. Pierson and S. J. Loughran, plaintiffs and appellees, and John S. Kidd, defendant and appellant, a final judgment was rendered against the said John S. Kidd, and the said John S. Kidd having obtained a writ of error and filed a copy thereof in the clerk's office of the said court
99 to reverse the said judgment in the aforesaid suit, and a citation directed to the said I. E. Pierson and S. J. Loughran, citing and admonishing them to be and appear at a term of the Supreme Court of the United States to be holden at Washington the second Monday of October next, on the third Monday thereof:

Now, therefore, the condition of the above obligation is such that if the said John S. Kidd shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

JOHN S. KIDD.
J. G. ROUNDS.
CHAS. W. ROGG.

STATE OF IOWA, } ss:
Polk County, }

We, J. G. Rounds & Chas. W. Rogg, being severally sworn, depose and say and each for himself says that he is a resident of the State of Iowa; that he is one of the sureties in the foregoing bond; that he is worth the sum of ten thousand dollars beyond the amount of his debts, and that he has property liable to execution in the State of Iowa equal to ten thousand dollars.

J. G. ROUNDS.
CHAS. W. ROGG.

Sworn to before me and subscribed in my presence by the said J. G. Rounds and Chas. W. Rogg this 14th day of September, 1887.

[Notarial Seal R. O. Green, Iowa.]

R. O. GREEN,
Notary Public.

[Endorsed:] 12885. John S. Kidd *v.* I. E. Pearson *et al.* Writ of error bond. Filed Sep. 20, 1887. G. B. Pray, clerk sup. court.

The within bond and sureties approved this September 15th, 1887.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

100 UNITED STATES OF AMERICA:

The President of the United States to I. E. Pearson and S. J. Loughran, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October, 1887, next, on the third Monday of said term, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John S. Kidd is plaintiff in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Austin Adams, chief justice of the supreme court of Iowa, this 15th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

101 The annexed citation came into my hands for service September 20th, 1887, and on the same day I served it on I. E. Pearson and S. J. Loughran, at Des Moines, Iowa, by reading it to each one of them and delivering to each one a true copy thereof.

EDW. CAMPBELL, JR.,
U. S. Marshal,
By S. S. ETHRIDGE, *Deputy.*

Fees, $5.10, paid by John S. Kidd.

[Endorsed:] 12885. John S. Kidd *vs.* I. E. Pearson *et al.* Citation. Filed Sep. 20, 1887. G. B. Pray, clerk sup. court.

102 *Assigment of Errors. Filed Sept.* 20, 1887. *G. P. Pray, Clerk Sup. Court.*

UNITED STATES OF AMERICA:

Supreme Court.

JOHN S. KIDD, Plaintiff in Error,

vs.

I. E. PIERSON and S. J. LOUGHRAN, Defendants in Error.

Now comes the said John S. Kidd, plaintiff in error, and for an assignment of errors herein says that at the January term, A. D. 1887, of the district court of Polk county, in the State of Iowa, in a certain cause therein pending, in which he, the said John S. Kidd, was defendant and the said I. E. Pierson and S. J. Loughran were plaintiffs, a decree was rendered against him and in favor of the said Pierson and Loughran ordering the abatement of the International Distillery premises, buildings, fixtures, machinery, etc., as a nuisance; also prohibiting and enjoining the said John S. Kidd from operating or using the said International Distillery premises, property, buildings, fixtures, machinery, etc., for the manufacture of alcohol, and also awarding judgment against him, the said Kidd, for the costs of suit.

103 And said John S. Kidd further represents that at the June term, A. D. 1887, of the supreme court of the State of Iowa, which is the highest court of law or equity in said State in which a decision of said case could be had, said decree was by said court affirmed.

The proceedings against the said Kidd were brought under chapter six, title eleven, of the code of Iowa, as amended by chapter one hundred and forty-three of the acts of the twentieth General Assembly. So much of the said statute as is necessary to the decision of this case is set out herewith as Exhibit A and is hereby referred to and made a part hereof.

In the rendition of the said decree and in its affirmance error intervened to the prejudice of said John S. Kidd, as will appear

from the record, and among the errors so intervening are the following, viz:

1. The said John S. Kidd was engaged in the manufacture of alcohol at and upon the premises of the International Distillery, and the alcohol manufactured was by him shipped to other States and to foreign countries, and such manufacture was, by reason of such disposition of the product, adjudged to be illegal and a nuisance, and the said distillery was therefore ordered to be abated and the said John S. Kidd forever enjoined from using or operating the same for the manufacture of alcohol.

2. The said John S. Kidd was engaged in the manufacture of
104 alcohol at the International Distillery in the city of Des Moines, in said State, and the alcohol so manufactured by him was by him shipped to other States and to foreign countries, and it was held that the manufacture of alcohol when carried on for the purpose of such shipment was in violation of the statute of Iowa, and said statute was held to be valid and not repugnant to the Constitution of the United States, section eight, article one.

3. The said statute of Iowa was construed to limit and confine the manufacture of alcohol in said State to such as was to be sold therein for medicinal, mechanical, culinary, and sacramental uses, and to prohibit such manufacture for transportation or use outside of the State, and, so construed, the said statute was held to be valid and not repugnant to the Constitution of the United States, section eight, article one.

4. The said statute of Iowa, as construed by the State courts, permits the manufacture of alcohol in said State when such alcohol is to be sold therein for medicinal, mechanical, culinary, and sacramental uses, and forbids such manufacture when such alcohol is to be shipped to other States or countries or is put to any other use, and, so construed, the said statute was held to be valid and not repugnant to the Constitution of the United States, fourteenth article of amendment thereto.

105 5. The said statute of Iowa was construed to permit the manufacture of alcohol only when manufactured to be sold for medicinal, mechanical, culinary, and sacramental uses, and to prohibit its manufacture when manufactured and sold without restriction to such uses, although sold and used in other States and countries and in conformity with the laws of such other States and countries, and, so construed, the statute was held to be valid and not repugnant to the Constitution of the United States, section eighth, article one.

The several holdings complained of as error are all essential to sustain the decree rendered herein.

Wherefore he prays that the said judgment may be reversed.

JOHN S. KIDD,
By LEHMANN & PARK,
C. C. AND C. L. NOURSE, AND
GEO. G. WRIGHT,
His Attorneys.

106 EXHIBIT "A."

The sections following are sections of the code of Iowa, chapter six, title eleven, as amended by chapter 143 of the acts of the 20th General Assembly.

CHAPTER 6, TITLE XI, AS AMENDED.

Intoxicating Liquors.

Sale prohibited—declared a nuisance.

SECTION 1523. No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided; and the keeping of intoxicating liquors, with intent on the part of the owner thereof or any person acting under his authority or by his permission, to sell the same within this State contrary to the provisions of this chapter is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.

Importers.

SEC. 1524. Nothing in this chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance *of* such laws: Provided, That the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported and is sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any per-

107 sons from manufacturing in this State liquors for the purpose of being sold, according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes.

Penalty for manufacturing.

SEC. 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense shall pay a fine of two hundred dollars and costs of prosecution or be imprisoned in the county jail not to exceed six months, and on his second and every subsequent conviction for said offense he

shall pay a fine of not less than five hundred dollars nor more than one thousand dollars and costs of prosecution and be imprisoned in the county jail one year.

SEC. 1526. Any citizen of the State except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners is hereby permitted, within the county of his residence, to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows: Permit.

108 SEC. 1527. He shall first procure a certificate, signed by a majority of the legal electors of the township, town, or ward in which he desires to manufacture or sell said liquors, that he is a citizen of the county and State; that he is of good moral character, and that they believe him to be the proper person to buy and sell intoxicating liquors for the purposes named in the preceding section. Permit—how obtained.

SEC. 1528. He shall make and file a bond, to be approved by the auditor of the county where application is made, in the sum of three thousand dollars, with two or more sureties, who shall justify in double the amount of said bond, conditioned that he will carry out the provision of all the laws now or hereafter in force relating to the sale of intoxicating liquors, and which said bond shall run in the name of the county for the benefit of the school fund: Provided, That in case of a permit to manufacture intoxicatiug liquors the penalty of the bond shall be five thousand dollars. Bond.

SEC. 1529. Upon the presentation of such certificate and bond to the county auditor a day shall be fixed by the said auditor for the final hearing of the application by the board of supervisors and notice thereof given by publication in at least one newspaper published in the county or by posting such notice in the township, town, or ward in which the business is to be conducted. Such publication or posting shall be at least ten days prior to the time of the final hearing, and the applicant shall pay the expenses thereof in advance. Day of hearing publication.

SEC. 1530. At such final hearing any resident of the county may appear and show cause why such permit should not be granted, and the same shall be refused unless the board shall be fully Action by board. Grounds for refusal.

satisfied that all the requirements of the law have in all respects been fully complied with; that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood.

Profit on sales.

SEC. 1537. No person having a permit to sell intoxicating liquors under this chapter shall sell the same at a greater profit than thirty-three per cent. on the cost of the same, including freights,

Monthly report.

and every person having such permit shall make, on the last Saturday of every month, a return, in writing, to the auditor of the county showing the kind and the quantity of the liquors purchased by him since the date of his last report, the price paid, and the amount of freights paid on the same; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, for what purpose, and what price; also the kind and quantity of liquor remaining on hand, which report shall be sworn to by the person having the said permit and shall be kept by the auditor, subject at all times to the inspection of the public; and the provisions of this section shall apply to persons holding a permit to manufacture intoxicating liquors, so far as the same relates to the report; and any such manufacturer shall, within the time specified for parties holding a permit to sell, also report the quantity and kind of liquors by him manufactured since the date of his last report, and also the quantity and kinds of liquor sold by him and for what purpose and to whom sold.

Selling without permit.

109 SEC. 1540. If any person not holding such a permit, by himself, his clerk, servant, or agent, shall, for himself or any person else, directlyor in directly, or on any pretense or by any device, sell, or, in consideration of the purchase of any other property, give, to any person any intoxicating liquors, he shall for the first offense be deemed guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not less than fifty or more than one hundred dollars and costs of prosecution and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay, on conviction thereof, a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution and be imprisoned in the county jail not to exceed six

months. All clerks, servants, and agents of whatever kind engaged or employed in the manufacture, sale, or keeping for sale, in violation of this chapter, of any intoxicating liquor shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and information for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and subsequent convictions mentioned in this section shall be construed to mean convictions on separate indictments or information; and in default of the payment of the fines and costs provided for the first conviction under this section the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five, of this code until he shall have been imprisoned sixty days.

Owning or keeping with intent to sell.

SEC. 1542. No person shall own or keep or be in anyway concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this State or permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep or be concerned, engaged, or employed in owning or keeping such liquors with any such intent shall be deemed, for the first offense, guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not less than fifty nor more than one hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, and in default of such fine and costs he shall not be entitled to the benefits of chapter forty-seven, title twenty-five, of the code until he shall have been imprisoned sixty days; for the second and every other subsequent offense he shall pay a fine of not less than three hundred dollars nor more than five hundred or be imprisoned in the county jail not more than six months or by both such fine and imprisonment in the discretion of the court.

And upon trial of every indictment or information for violations of the provisions of this section proof of the finding of the liquor named in this

indictment or in the information in the possession of the accused, in any place except his private dwelling-house or its dependencies, or in such dwelling-house if the same is a tavern, public eating-house, grocery, or other place of public resort, or in unusual quantities in the private dwelling-house or its dependencies of any person keeping a tavern, public eating-house, grocery, or other place of public resort in some other place, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof.

Building a nuisance.

(Sec. 12, ch. 143, Acts 20 G. A.)

SEC. 1543. In case of violation of the provisions of either of the three preceding sections or of section fifteen hundred and twenty-five of this chapter the building or erection of whatever kind or the ground itself in or upon which such unlawful manufacture or sale or keeping with intent to sell, use, or give away of any intoxicating liquor is carried on or continued or exists and the furniture, fixtures, vessels, and contents is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish or continue or use any building, erection, or place for any of the purposes prohibited in said section shall be deemed guilty of a nuisance and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution and stand committed until the fine and costs are paid; and the provisions of chapter 47, title 25, of this code shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists or is kept or maintained may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished, as for contempt, by a fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months or by both such fine and imprisonment in the discretion of the court.

Keeping punished.

May be abated by injunction.

Transportation.

SEC. 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company or if any common carrier or any person in the employ of any common carrier or if any other person knowingly bring within this State for any person or persons or corporation or shall

knowingly transport or convey between points or from one place to another within this State, for any other person or persons or corporation, any intoxicating liquors without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation or within which it is to be conveyed from place to place certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county in the State through or to which said intoxicating liquors are transported or in which the same are unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued and shall specify the date at which the permit expires, as shown by the county records.

112 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of a case tried and decided in said court between I. E. Pearson and S. J. Lougran, plaintiffs and appellees, and John S. Kidd (now pl'ff in error), defendant and appellant, to wit, the abstract, being the record whereon said cause was submitted, the record of submission and decision and final judgment rendered therein, and petition for writ of error and order allowing the same, as full, true, and complete as the same are of record and on file in my office.

And I further certify that the writ of error allowed in said cause, writ of error bond, and citation and assignment of errors are attached to the foregoing transcript in original form and are trans-

mitted herewith as part of the return to said writ of error,
113 and I have retained in my office true copies of said writ of error, bond, and citation, and this return is made in obedience to said writ.

In testimony whereof witness my signature and seal of office, at Des Moines, Iowa, this 5th day of Oct., 1887.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court of Iowa.

Endorsed on cover: Iowa supreme court. No. 1147. John S. Kidd, plaintiff in error, *vs.* I. E. Pearson and S. J. Loughran. Filed October 10, 1887.

In the Supreme Court of the United States.

October Term, A. D. 1887.

John S. Kidd,

Plaintiff in Error,

vs.

I. E. Pearson and S. J. Loughran,

Defendants in Error.

Writ of Error to the Supreme Court of Iowa.

Motion to Advance.

BENJAMIN HARRIS BREWSTER,

Of Counsel for Plaintiff in Error.

F52

mitted herewith as part of the return to said writ of error,
113 and I have retained in my office true copies of said writ of error, bond, and citation, and this return is made in obedience to said writ.

In testimony whereof witness my signature and seal of office, at Des Moines, Iowa, this 5th day of Oct., 1887.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court of Iowa.

Endorsed on cover: Iowa supreme court. No. 1147. John S. Kidd, plaintiff in error, *vs.* I. E. Pearson and S. J. Loughran. Filed October 10, 1887.

In the Supreme Court of the United States.

October Term, A. D. 1887.

John S. Kidd,

Plaintiff in Error,

vs.

I. E. Pearson and S. J. Loughran,

Defendants in Error.

Writ of Error to the Supreme Court of Iowa.

Motion to Advance.

BENJAMIN HARRIS BREWSTER,

Of Counsel for Plaintiff in Error.

F52

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1887.

JOHN S. KIDD,

Plaintiff in Error,

vs.

I. E. PEARSON AND S. J. LOUGHRAN,

Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

The Honorable the Supreme Court of the United States:

The plaintiff in error moves that this cause be advanced for hearing and set down for an early day, and in support of such motion refers to the affidavits and statement of the case filed herewith.

BENJAMIN HARRIS BREWSTER,

Of Counsel for Plaintiff in Error.

F52

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1887.

JOHN S. KIDD,

Plaintiff in Error,

vs.

I. E. PEARSON and S. J. LOUGHRAN,

Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

STATEMENT OF THE CASE IN SUPPORT OF APPLICATION FOR ORDER ADVANCING THE CAUSE.

This is in form a suit in equity. Its object is to abate as a nuisance and perpetually enjoin the use for the manufacture of alcohol of the establishment known as the International Distillery, at Des Moines, Iowa.

The facts of the case are simple, and there is no controversy respecting them. The plaintiff in error had been operating the distillery for the manufacture of alcohol only, and had disposed of the product exclusively by shipment to and sale in other States and foreign countries, and it was held that manufacture of alcohol with a view to such disposition of the product was in violation of the laws of Iowa, and made the place where such manufacture was carried on a public nuisance.

Chapter six, title eleven of the code of Iowa relates to intoxicating liquors. It permits and regulates the manufacture and sale of intoxicating liquors in the State for medicinal, mechanical, culinary and sacramental purposes, and *prohibits, as construed by the Supreme Court in this case, such manufacture when the product is intended for sale and use outside the State.*

Section 1543 of the Code declares the place in which the unlawful manufacture of intoxicating liquors is carried on to be a nuisance, and provides that any citizen of the county in which such nuisance exists may maintain an action in equity to abate and perpetually enjoin the same, and prescribes as the punishment for a violation of the injunction issued in such a case a fine of not less than $500 nor more than $1,000 or imprisonment not to exceed six months, or both such fine and imprisonment. Under this section the present suit was brought.

A decree was entered ordering the abatement of the distillery as a nuisance, and an injunction issued absolutely and perpetually enjoining the plaintiff in error from hereafter using the premises for the manufacture of alcohol.

There is in the case no complaint respecting the location of the establishment nor the methods by which the manufacture was carried on; the sole ground for holding the place to be a nuisance is that alcohol was there manufactured with intent *to ship it to and dispose of it in other States and countries.*

Neither is there in the case any complaint of special injury to the defendants in error. They sue solely by authority of the section above cited (1543) as representatives of the public; not for the redress or prevention of a private injury, but to prevent the commission of an offence against the laws of the State.

The decree, if carried out, accomplishes the destruction of the property, because it is not adapted to any other use than the manufacture of alcohol. In the meantime, the injunction prohibiting its use remains, and the property stands idle, deteriorating from day to day, and if it so continues until this case is reached in regular course it will involve great and irretrievable loss to its owner.

The case presents a Federal question of the gravest character and of the highest importance.

We ask that it be advanced, and we do so because:

First.—Although in form a private controversy between individuals, it is in fact a criminal proceeding by the State.

Second.—The decree is in the nature of a sentence which is being actually executed against the plaintiff in error.

Third.—The plaintiff in error is being punished by deprivation of the use of his property, and by being prohibited from the exercise of his calling, and the property involved by standing idle is rapidly deteriorating in value, and for all the injury thus suffered, if it shall be determined to have been unjustly inflicted, there is no indemnity and can be no recompense.

Fourth.—By reason of the public nature of the case, the decree affects all persons engaged and all property employed in the State of Iowa in the manufacture of alcohol for exportation, and thus a large and valuable industry, in which millions of capital are invested ana hundreds of men employed, is stricken to the ground.

Fifth.—The general commercial interests of the country are seriously and injuriously affected by the decree.

This is in its nature a criminal proceeding, although in form a suit in chancery. It is in effect a proceeding by the State, although upon the record private persons are complainants.

It is a suit specially authorized by statute as a means of enforcing one of the criminal laws of the State, and the complainants act not for themselves but for and on behalf of the public. Both these propositions have been affirmed by the Supreme Court of Iowa, in the case of *Littleton* vs. *Fritz*, 65 *Iowa*, 488, wherein the constitutionality of this proceeding was drawn in question. It was said (page 494): "It (this proceeding) belongs to that class of remedies "which may properly be provided by statute to aid in the "administration of preventive justice. It stays the arm of "the wrong-doer." * * * * * *

"The purpose is to prevent a public offence and suppress what the law declares to be nuisance." Further in the same case it is said, page 494: "The plaintiff is by law made the representative of the public in bringing and maintaining the action."

In further illustration of this we refer to chapter 66, Acts of the Twenty-first General Assembly of Iowa, an Act providing, as its title declares, "for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances." By section one of this Act it was provided that actions of this kind might "be brought in the name of the State of Iowa, by the district or county attorney of the proper county, and it shall be the duty of such district or county attorney, where any such nuisance exists, to institute and prosecute such action for the abatement thereof."

It was by the same section provided that nothing in it contained should prevent any citizen from bringing such suit in his own name.

However the suit may be brought, it is a suit by the State, highly penal in its consequences and involving interests of general and public importance.

The decree is in the nature of a sentence against the plaintiff in error and all concerned with him. It breaks up his business, prohibits him from the exercise of his occupation, deprives him of the use of valuable property and condemns that property to idleness and decay.

How serious these consequences are in the present case alone, our affidavits disclose. Property worth a quarter million of dollars, and highly profitable in use, is closed up, and not alone is its use lost, but by standing idle the property falls sooner into decay, and thus a further loss is suffered from the decree. The injury from these two sources is not less than a hundred thousand dollars per year.

One hundred and thirty-two men, of whom one hundred and nineteen are married and the heads of families, were afforded employment at this establishment, and received wages averaging two and two-thirds dollars per day. These men are by this decree deprived of the labor upon the earnings of which they depended for the support of themselves and their families, and are now without prospect of soon obtaining other employment. They are vitally interested in the speedy determination of this case.

The defendants in error as individuals have nothing at risk; as representatives of the public their purpose cannot but be promoted by an early hearing.

In *Miller* vs. *The People*, 12 *Wallace*, 159, in which a motion to advance the case was made on the ground that the State of New York was a party, the motion was refused, because the State was only a nominal party. The Court in that case held that not the form, but the substantial nature of the case, should be looked to in determining the question of precedence.

Looking to the substance of this case, it is one for which provision is made by the rules. Looking to the nature of the judgment and the consequences that follow from its inherent force, the case is a proper one for advancement, as to await the ordinary course of hearing is virtually to give full effect to the decree without the possibility of recompense, as

the defendants in error were not required to give security, and are financially irresponsible.

The power is inherent in every court to make such orders as are necessary to effectuate justice between the parties.

We recognize that the inconvenience commonly incident to delay in all cases affords no cause for unusual and extraordinary action by the courts, but where peculiar injury and hardship are the consequence of delay, and relief against it can be granted without corresponding injury to the other party, the courts do not hesitate to interpose.

In actions at law the rights of both parties can be preserved *in statu quo* by means of a stay or supersedeas. In criminal suits the same end is accomplished by means of bail, and where this does not avail an early hearing may be granted under the 26th rule. In chancery suits, where extraordinary remedies are awarded, if that is required for the prevention of injury, and the party cannot be otherwise indemnified, the decree may be suspended.

If this suit was in substance what it was in form, the injury flowing from the decree could be prevented by supersedeas. Examples are abundant among the precedents of chancery of decrees being entirely suspended pending the determination of an appeal.

"The Court will, however, in some cases, upon special application of the appellant, suspend the proceedings under a decree or order pending a rehearing on appeal. * *

"So also where there would be danger of irreparable mischief. In cases of injunction, for instance, and still more of orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution."

Fifth Edition Daniel's Chancery Practice, Vol. II., pp. 1468 *and* 1469.

"An appeal from a Court of Equity to the House (of Lords) does not stay execution of a decree. However, it is

consistent with that regulation that a special application may be made either to the House of Lords or to the Court below. It has accordingly become usual for applications under various circumstances to be made to stay proceedings pending an appeal; these are not, however, favored, and it has been said that the execution will be suffered to proceed, unless the Court sees that if it should turn out to be wrong, the party cannot be set right again."

Joyce on Injunctions, Vol. II., pp. 1319 *and* 1320.

In *Walford* vs. *Walford, L. R.,* 3 *Ch.,* 812, it was held that "the case was one in which irreparable injury might be done to the defendant; and the defendant undertaking to proceed with the appeal with due diligence and to abide by any order as to damages which the Court might make, the Court suspended the injunction pending the appeal."

Joyce on Injunctions, Vol. II., pp. 1320 *and* 1321.

"The grounds of suspending the proceedings may be furnished by the nature of the effect of the decree; what is to be done under it; the situation of the party entrusted with the fund in the meantime, and the irremediable mischief likely to result from the prosecution of the decree."

Smith's Ch. Prac., Vol. II., p. 68.

See also *Eden on Injunctions, Vol. II., p.* 374.

A stay should be granted when the enforcement of the decree pending an appeal will render it impossible to set the appellant right again if he is successful in his appeal.

Jewett vs. *Dringer,* 29 *N. J. Eq.,* 129.

Chegary vs. *Schofield,* 5 *Ibid.,* 529.

Ryerson vs. *Boorman,* 7 *Ibid.,* 640.

See also *Hart* vs. *The May, or* 3 *Paige Ch.,* 380.

This Court has provided for such an exigency in the procedure of the Federal Courts by rule 93, adopted at the October Term, 1878.

In *Hovey* vs. *McDonald*, 109 *U. S.*, 150, the Court recognized this right to suspend the decree pending a final determination of case as an inherent power, to be exercised under proper circumstances by either the Court rendering the decree or the appellate tribunal.

Thus in every case, unless this be an exception, whatever its form, whether common law, criminal or chancery, the power exists, and wherever necessary will be exercised to prevent peculiar and irremediable injury consequent upon delay.

The peculiar nature of this case precludes application of the ordinary methods of the law for the prevention of injury pending appeal. The business of the plaintiff in error has been enjoined because in violation of law. He claims the right to resume and continue it upon the broad ground that what he is prohibited from doing he has, under the Constitution of the United States, a right to do. A supersedeas, even if proper in a case like this, would not relieve the plaintiff in error and his employees from other forms of prosecution under the Iowa law. If the law of Iowa here in question is a valid enactment, the plaintiff in error has no right to continue in violation of it; but if that law violates the Constitution and is invalid, then this decree, which undisturbed works his ruin, should be reversed, and as delay exposes him to consequences no less disastrous than those of an adverse judgment, as an order of stay or suspension cannot relieve him from prosecution in other forms, as his condition in fact is like that of a defendant in a criminal case actually undergoing puishment, and the full effect of the sentence will be exercised upon him otherwise, as the sole means of justice to him if his cause be just, the case should be advanced.

This application of the forms of procedure used in cases of private controversy to the enforcement of criminal laws is a new departure in our jurisprudence. We have no occasion to call in question either its wisdom or justice if

only it is not made the means of irremediable injury to the plaintiff in error. It is a heavy punishment of all concerned to condemn this establishment to idleness, and thus utterly destroy it. If, however, the manner in which it has been used and in which it is desired to use it hereafter is unlawful, that punishment, heavy as it is, must be borne. But if the plaintiff in error and those interested with him have done no more than *as citizens of the United States* they had a right to do, then the punishment ordered by this decree, and now actually being inflicted, ought to be averted as speedily as possible, because for all they suffer there is and can be no recompense.

We have no claim and make none to even transient immunity against the valid penal enactments of the State of Iowa. We ask only for a speedy settlement of the controversy, for only so can our rights and interests and the rights and interests of all others, put in jeopardy by this decree, if it be unjust, be in any measure conserved.

Other considerations argue in favor of our prayer for a speedy hearing. This distillery was not built and operated in conscious contravention of the laws of Iowa. The law which authorizes the particular form of proceeding here employed was passed in 1884, but the law which is held to render manufacture for exportation illegal was passed in 1855. This distillery was built in 1882. It was built in the hope, not of successfully evading or defying the law, but in the belief that the manufacture of alcohol for exportation was not prohibited by law. Such was the opinion and advice of able and respectable counsel of the Iowa bar.

Several large distilleries were then, and long had been, in active operation in different localities of the State, and the great bulk of the product of all of them was shipped out of the State. No complaint had ever been made against any of them as acting in violation of law. Public invitation and encouragement was given to the location of this distillery in the State. The city of Des Moines, by its Council, voted it immunity from municipal taxes for a period of five

years. The Senate of Iowa, in March, 1882, having before it a proposed amendment to the Constitution of the State, which it approved, passed a resolution construing it as follows, namely: "Be it resolved by the Senate, that said proposed amendment was and is designed and intended to prevent the manufacture within the State, for sale within this State, as a beverage, all intoxicating liquors, including ale, wine and beer, and to prevent the selling of such liquors within this State for use as a beverage, and to prohibit the keeping of such liquors for sale as a beverage within this State; and was not designed to prohibit the manufacture for sale, or keeping for sale, of such liquors for any or all other purposes."

This resolution was passed in view of the proposed construction of the very distillery in question. The Supreme Court of Iowa had, in several cases, expressed views which justified the belief that manufacture of alcohol for exportation was not prohibited, in one case, *Becker* vs. *Betten*, 39 *Iowa*, 669, saying: "The right of export remains unlimited to the manufacturer and purchaser." In the pending case the Court was divided, standing three to two, in the construction of the law, the minority holding that it did not prohibit manufacture for exportation. The parties concerned in the construction and operation of this distillery acted throughout in entire good faith, and in the belief that they were offending against neither the letter nor the spirit of any law of the State.

The decision in this case, giving construction and effect as it does to the public enactments of Iowa, affects not only the plaintiff in error and the International Distillery, but as well all other persons in Iowa engaged in this business and all property employed in its conduct.

The entire industry in the State is arrested by this new interpretation of the statute, and operation cannot either with safety or propriety be resumed so long as this case remains unreversed.

The general and public interests of a commercial character here involved are proper to be considered in this connection.

The State of Iowa does not absolutely prohibit the manufacture and sale of intoxicating liquors, but permits them under certain regulations to be made and sold in the State for all purposes, except use as a beverage. But commerce with other States and countries in such liquors is absolutely denied to persons in Iowa, not indeed directly by a prohibition of the transportation, but by a prohibition upon what accomplishes the same thing, manufacture for exportation.

The characteristic of modern industry is that production is in the main carried on not for any particular or local demand, but for the markets of the world. This is specially true of manufactures conducted upon a large scale. These tend to concentrate, not at the places of greatest demand for the product, but at places where the facilities for manufacture are cheapest and most abundant. The prime elements in the manufacture of alcohol are coal and corn. In Iowa these are abundant and cheap. For this reason the International Distillery and other large establishments for the manufacture of alcohol have been built in that State, although the demand for their product was almost wholly form without.

Alcohol is used in many arts and manufactures. Next to water it is the most general solvent. In the manufacture of drugs and chemicals it is absolutely indispensable. The whole art of pharmacy, it may be said, is based upon the use of alcohol as a solvent.

It enters largely into the composition of paints, varnishes, perfumes, the finest soaps, stearine candles, and many other articles of daily use. It is used in all dyeing and lacquering establishments, is employed as a preservative in all museums, and as a fuel and cleansing material by jewelers, dentists, photographers, and many other workers in mechanical arts.

The amount of alcohol required for these different uses is variously estimated at from nine to twenty millions of gallons annually. The annual product of the establishment in question is about two millions of gallons, and constitutes an important element of the commerce in this commodity.

The demand for alcohol for consumption in Iowa is comparatively very limited, as the arts and manufactures in which it is most extensively used have their seats elsewhere.

The law of Iowa recognizes that the chemical and mechanical uses of alcohol are necessary and benefical, and authorizes alcohol to be made and sold therefor, when the use is to be within the State; but when it is to be used without, when the manufacture is for the world's market, for which alone it is practicable to carry it on, that law holds the manufacture to be illegal and prohibits it as a nuisance.

Whether a State can evade the exclusive authority of Congress to regulate commerce between the States and with foreign countries, by prohibiting, not indeed the exportation of a commodity in direct terms, but by prohibiting its manufacture or production for exportation, is the question presented by the record in this case.

The importance of this question to the general industrial and commercial interests of the country is manifest. The harmony of relation between the several States of the Union secured by the Federal Constitution is destroyed, and narrow local interests made paramount to the general welfare.

While this decree stands, the manufacture of alcohol to enter into the general commerce of the country must cease in Iowa, because, by whomsoever conducted, it is in violation of law. Every art and manufacture in which alcohol is used is injuriously affected by the decree. The right of the citizens of this country to go freely into any of the States and buy their productions and manufactures for general commercial or industrial purposes, is abridged, and to the extent that

they are concerned in the cheap production and free transportation of this commodity, they are injured by the decree.

We recognize the force of what is said in *Poindexter* vs. *Greenhow*, 109 *U. S.*, 64, in refusing the motion to advance the cause, but we believe that we are within the rule for advancing causes there stated. The magnitude of the interests here involved, the public nature and general commercial importance of the case, the large number of persons directly, and the larger number indirectly, concerned, the nature of the decree, the enormous and irremediable injury it works, the consideration that no other mode of relief is adequate or available, make our claim for an early hearing as imperative as our claim to be heard at all.

BENJAMIN HARRIS BREWSTER,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1887.

JOHN S. KIDD,

Plaintiff in Error,

vs.

I. E. PEARSON and S. J. LOUGHRAN,

Defendants in Error.

AFFIDAVITS IN SUPPORT OF MOTION TO ADVANCE THE CAUSE FOR HEARING.

STATE OF IOWA, } *ss.:*
POLK COUNTY. }

John S. Kidd, being first duly sworn, deposes and says:

That he is the plaintiff in error herein; that he has been engaged in the business of distilling and in business related thereto for twenty-two years; that the property involved in this case is a large distilling establishment, known as the

International Distillery, and located at the city of Des Moines, in the State of Iowa; that the said distillery was built during the years 1881-2, and that he superintended the construction of the same; that it was built at a cost which, together with improvements subsequently made, amounted to $250,000, and the said distillery is now worth the said sum of $250,000.

That he has operated the same from the time it was built until in May, 1887, when it was closed by the decree rendered in the above-entitled cause.

That in its operation, except for a few weeks in 1882, when it was first started, there has been manufactured into alcohol in the said distillery not less than fifteen hundred bushels of grain per day, yielding a product of 6,750 gallons of alcohol.

That during the season for feeding cattle, there were kept and fed in the barns of the said distillery not less than sixteen hundred head of cattle.

That the said distillery gave employment to never less than one hundred and thirty-two men, who received an average of $2.66 per day as wages. Of the men so employed one hundred and nineteen were married men and the heads of families, and the weekly pay-roll for the said employees was $2,109.65.

That a large and valuable trade has been built up, at great expense, for the products of the said distillery, and he has now contracts outstanding, and having still a long time to run, for the sale of alcohol.

That the product of the said distillery has been alcohol, crude or refined, and that it has all been shipped out of the State of Iowa to other States and foreign countries, and there sold in accordance with the law of such other States and foreign countries.

That by decree rendered in this cause, he has been prohibited and perpetually enjoined from further operating the said distillery, and has been compelled to close the same.

That in order to fulfill his contracts and maintain his trade, he is required to go upon the market and buy the same at a great loss to himself.

That by reason of the closing of the said establishment the use thereof is entirely lost, and the damage caused thereby is $100,000 annually.

That the men heretofore engaged in and about the said distillery have been, in consequence of the said decree, thrown out of employment, and a large majority of them are still without employment, and without prospect of obtaining employment in the near future, unless the said distillery is permitted to resume operation.

That in addition to the loss hereinbefore stated, and as the result of the closing down of the said establishment, to its owners and their employees, there will be a further loss to the owners because of the rapid deterioration of the value of the building and the machinery of the said distillery while standing idle.

That after using all precautions to keep the said property in as good condition as possible while standing idle, the loss resulting from a deterioration in value because of standing idle will be not less than $25,000 per year; that in addition to this loss the expense of keeping the property insured will amount to $4,300 per annum.

That the said establishment was constructed especially for the purposes of a distillery, and is not adapted to, and cannot be converted to any other use; that all the machinery therein, and constituting the greater part of its value, is totally unfit for any other than distilling purposes.

He further states that when it was proposed to erect the said distillery members of the Iowa bar, in good standing, were consulted with respect to the laws of the State of Iowa, and they all concurred in advising that there was no provision in the laws of Iowa prohibiting the manufacture of alcohol for shipment without the State to other States and foreign countries.

That public invitation and encouragement was given to the building of the said distillery; that the City Council of the city of Des Moines, as an inducement to its construction, voted that it should be exempted from municipal taxation for a period of five years, and while the distillery was in process of being erected the Senate of the State of Iowa, having then before it a proposed amendment to the constitution of the State prohibiting the manufacture and sale of alcoholic liquors as a beverage, by resolution construed the same as follows:

"Be it resolved by the Senate, That said proposed amendment was and is designed and intended to prevent the manufacture within this State, for sale within this State, as a beverage, all intoxicating liquors, including ale, wine and beer, and to prohibit the selling of such liquors within this State for use as a beverage, and to prohibit the keeping of such liquors for sale as a beverage within this State; and was not designed to prohibit the manufacture for sale, or keeping for sale, of such liquors for any or all other purposes."

And the Supreme Court of Iowa, as this deponent was advised, had, in a number of decisions theretofore rendered, laid down a doctrine which deponent was advised gave sanction to the manufacture of intoxicating liquors for shipment to other States and countries, and had in one case expressly said: "That the right of export remains unlimited to the manufacturer and purchaser."

That at the time the construction of the International Distillery was entered upon, a number of large distilling establishments existed in the State, some of which were then in operation and long had been, and such as were closed were so closed, not by virtue of any legal proceeding, but by virtue of a voluntary agreement with what was known as the Western Export Association, and this deponent was advised and believes that no complaint had ever been made against any of such establishments as being operated in vio-

lation of law, although the said establishments had, during the entire perion of their operation, shipped the great bulk of their product out of the State, to other States and foreign countries.

That by the opinion of the Supreme Court of Iowa in this cause it was decided that the operation of the International Distillery, in the mode in which the same was conducted, to wit, the manufacture of alcohol for shipment to other States and foreign countries, was illegal under and by virtue of the prohibitory law of the said State as enacted in the year 1855; but this deponent and those interested with him in the said enterprise were, by reason of the matters hereinbefore set forth, induced to believe, and did believe, that the said law was not in its terms applicable to the manufacture of alcohol for shipment without the State, and the said distillery was built and operated during the entire period of its operation, not in the view or with the intent of evading or of violating the laws of the State of Iowa, but in the belief, honestly entertained, and induced by the matters hereinbefore set forth, that such operation would be in strict and substantial conformity with the law and policy of the said State.

That under the construction of the said law by the Supreme Court of Iowa, alcohol could be manufactured in the said State only when manufactured to be sold therein for medicinal, culinary, mechanical, and sacramental purposes.

That the demand in the said State for alcohol, crude or refined, is very limited, the arts and manufactures in which alcohol is chiefly used being carried on in other States and countries, and so far as a market exists in the State of Iowa for the sale of alcohol, the same is, under the laws of the said State, open to the competition of distilling establishments, wherever located.

That by the decree in this case the defendant has been held to have forfeited the right to manufacture alcohol even for sale within the State for mechanical, medicinal and

culinary purposes; but such restricted and limited right, for the reasons set forth, even if permitted to him would be utterly valueless, and would not pay even a small percentage of the expenses of operating so large an establishment, and unless the said establishment is permitted to manufacture alcohol for shipment to other States and foreign countries it must remain closed.

Deponent further says that no bond or other security has been given or required of the defendants in error herein; that he knows the financial standing of the said parties, and each of them, and that they and neither of them have property subject to execution, and therefore no part of the loss or damage that will result from the closing of the said distillery and its remaining closed can be recovered from them.

And further deponent saith not.

JOHN S. KIDD.

Sworn to before me, and subscribed in my presence by the said John S. Kidd, this thirtieth day of September, A. D. 1887.

[SEAL.]

C. W. DORN,
Notary Public, in and for Polk County, Iowa.

STATE OF IOWA, }
POLK COUNTY. } ss.:

W. R. LOCKE, being first duly sworn on oath, deposes and says that he is a resident of Des Moines, Polk County, Iowa; that he is, and ever since the International Distillery began operation has been, engaged therein as chief bookkeeper and cashier; that the smallest number of men regularly engaged in and about the distillery is one hundred and thirty-two, and the average wages paid them per day is $2.66, the weekly pay roll being $2,109.65; that of the men so employed when the International Distillery was closed by the decree in this cause one hundred and nineteen were married men and heads of families; that these men were thrown out of employment in consequence of the closing of the said establishment, and most of them are still without employment, and without prospect of obtaining it in the near future, unless the said distillery resumes operation; that the cost of constructing the said establishment was $250,000, and that the expense of keeping the said establishment insured is $4,300 per year; that when in operation there was used not less than fifteen hundred bushels of grain per day, and during the feeding seasons never less than sixteen hundred head of cattle, and sometimes as high as four thousand head of cattle, were kept and fed in the barns of the establishment upon the slops of said establishment; that a large and valuable trade has been built up for the products of the said distillery, and contracts for the sale of alcohol having still a long time to run are now outstanding, and that in order to fill said contracts and to maintain said trade they are required to purchase alcohol at a price beyond the cost of manufacture.

That the earnings of the said distillery to its proprietor during the year previous to its being closed were $10,000 per month.

That the product of the said establishment was alcohol, crude and refined, and the same was all disposed of by shipment to, and sale in, other States and foreign countries.

Further deponent saith not.

W. R. LOCKE.

Subscribed in my presence, and sworn to before me by the said W. R. Locke, on this thirtieth day of September, A. D. 1887.

C. W. DORN,
Notary Public, in and for Polk County, Iowa.

STATE OF IOWA, }
POLK COUNTY, } *ss.:*

FREDERICK MEDYNSKI, being first duly sworn, on oath deposes and says that he is a resident of Des Moines, Iowa; is 36 years of age, and is by occupation a mechanical engineer.

That he has had fourteen years' experience in such employment, and has for nine years been engaged in distilleries as an engineer in charge of works.

That he assisted in the construction of the International Distillery, and had charge of the construction and placing of the machinery therein, and that from the beginning he has been employed in the said establishment as chief engineer and master mechanic.

That if the said establishment is closed down and compelled to remain idle, the building will rapidly decay, and in less than three years will become unfitted and unsafe for use; that the machinery in the said establishment, if permitted to stand idle, will rapidly rust and become impaired

in strength and fitness for service; that using the best precautions for keeping the said establishment in as good repair as is possible, the injury to the same from standing idle will not be less than $25,000 per year.

That from his experience in the construction and management of such works, from his knowledge of their decay when not in use, it is his opinion that after three years of idleness it will require at least $100,000 to place the International Distillery in as good condition and as fit for operation as it was when closed down in May of this year under decree of the Court rendered in this cause.

This deponent further says that he has read the affidavit of Jonn S. Kidd, and has personal knowledge with respect to the statements therein made as to the extent of the operations of the said establishment, the amount of grain daily used, and the cattle in its barns in season, the number of men employed and the wages paid to them, and the cost of construction, and the value of the said establishment, and that the statements of the said John S. Kidd in that respect are true.

Further deponent saith not.

F. V. MEDYNSKI.

Subscribed in my presence, and sworn to before me by the said Frederick Medynski on this thirtieth day of September, A. D. 1887.

C. W. DORN,
Notary Public, in and for Polk County, Iowa.

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN S. KIDD, PLAINTIFF IN ERROR,

vs.

J. E. PEARSON AND S. J. LOUGHRAN.

AFFIDAVIT OF GEORGE W. KIDD.

Personally appeared before me, the undersigned, a notary public in and for the District of Columbia and city of Washington, George W. Kidd, of the city of New York, and deposes and says that the effect of the judgment of the supreme court of the State of Iowa brought in question by the writ of error in this cause has been to compel the plaintiff in error to close the large distillery carried on by him in the city of Des Moines, in the said State, for the manufacture of alcohol for exportation only from the said State of Iowa, thereby inflicting on the said plaintiff in error irremediable damage.

And this deponent further saith that the plant which has been employed in carrying on the said business is of great value, the roofs of the buildings sheltering the said business covering an area of ten acres, and the refuse of the said distillery feeding about 4,000 head of cattle every year, and that the net income from the said business was, on an average, ninety-six thousand dollars *per annum*.

And this deponent further saith that the expense of preserving from deterioration and protecting the machinery and fixtures of the said distillery has amounted to an average of one hundred dollars a day ever since the said distillery has been closed, and that the sum of said expenses from July, 1887, the month next after the close of the said distilery, up to the first day of January, 1888, was $13,600, all of which is a dead loss, to be added to the loss of all interest or profit on the capital represented by the said plant.

And this deponent further saith that a large number of operatives, thrown out of employment by the closing of the said distillery, is awaiting a decision of the question involved in this cause, and that the sole and only question so involved is the right of said plaintiff in error to manufacture alcohol within the said State of Iowa for exportation and sale outside of the said State only.

And this deponent further saith that he hath a large interest in the said business, and that the matters and things above stated he knows to be true, and further this deponent saith not.

Given under my hand and seal this — day of February, 1888.

Notary Public.

Office Supreme Court U. S.
FILED
MAR 2 1888

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1887.

JOHN S. KIDD, Plaintiff in Error,

vs.

I. E. PEARSON and S. J. LOUGHRAN, Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

BENJAMIN HARRIS BREWSTER AND
F. W. LEHMANN,
FOR THE PLAINTIFF IN ERROR.

DES MOINES, IOWA:
CAMPBELL PRINTING COMPANY.
1888.

Office Supreme Court U. S.
FILED.
MAR 2 1888

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1887.

JOHN S. KIDD, Plaintiff in Error,

vs.

I. E. PEARSON and S. J. LOUGHRAN, Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

BENJAMIN HARRIS BREWSTER AND
F. W. LEHMANN,
FOR THE PLAINTIFF IN ERROR.

DES MOINES, IOWA:
CAMPBELL PRINTING COMPANY.
1888.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD,
Plaintiff in Error,

vs.

I. E. PEARSON AND
S. J. LOUGHRAN,
Defendants in Error.

Writ of Error to the Supreme Court of Iowa.

BENJAMIN HARRIS BREWSTER AND F. W. LEHMANN,
For the Plaintiff in Error.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a suit in equity, brought by the defendants in error, I. E. Pearson and S. J. Loughran, as plaintiffs, in the district court of Polk county, Iowa, against the plaintiff in error, John S. Kidd, as defendant, to perpetually enjoin him from using or operating, for the manufacture of alcohol, an establishment in the city of Des Moines, known as the International Distillery, and to abate the distillery itself as a nuisance. There was a trial on the merits, and a decree as prayed.

The petition describes the premises upon which the distillery named is located, and alleges that it was erected for the manu-

facture of liquor for unlawful purposes, and that the plaintiff in error, Kidd, has, ever since the fourth day of July, 1884, used the establishment for the unlawful manufacture and sale of intoxicating liquors.

The answer denies the allegation of the petition, and states further that Kidd was empowered by the proper authorities to manufacture and sell liquor for all purposes not prohibited by law, and that in the conduct of his business he had complied with all the requirements of the law.

The evidence sustained the statements of the answer as to the permit, and as to the rest showed that during the period mentioned Mr. Kidd had continuously operated the distillery for the manufacture of alcohol, crude or refined, and that this, save a few barrels sold to Iowa College for museum purposes, had all been shipped to, and sold in, other states and foreign countries.

The liquor sold in Iowa was for a purpose authorized by the laws of that state, and there is no contention respecting it.

The state courts held that the fact that the product of the distillery had been transported from, and disposed of outside the state, warranted the inference that it had been manufactured with intent to make such disposition of it.

It was not shown or claimed that the law of the place in which the alcohol was disposed of was in any instance violated, nor was it claimed that in the location of the distillery, or in the mode of its operation, any law of the state was violated, or any of the rights of defendants in error infringed.

The manufacture of alcohol, as carried on by Mr. Kidd, was held to be illegal because of the intent to dispose of the product in other states and foreign countries, and for no other reason; and for that reason he was enjoined from further operating the distillery, and the distillery itself was declared to be a nuisance and ordered to be abated.

The suit was brought under authority of chapter six, title eleven, of the Code of Iowa, and amendments thereto. The provisions of law applicable to the case are the following:

SECTION 1523. No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquors, with intent on the part of the owner thereof, or any person acting under his authority, or by his permission, *to sell the same within this state*, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquors so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.

SECTION 1524. Nothing in this chapter shall be construed to forbid the sale by the importer thereof, of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws; provided, that the said liquor at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only; *and nothing contained in this law shall prevent any persons from manufacturing in this state, liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes.*

SECTION 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months; and on his second and every subsequent conviction for said offense he shall pay a fine of not less than five hundred dollars, nor more than one thousand dollars, and costs of prosecution, and be imprisoned in the county jail one year.

SECTION 1526. Any citizen of the state, except hotel-keepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is hereby permitted within the county of his residence to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which said business is conducted, as follows:

SECTION 1527. He shall first procure a certificate signed by a majority of the legal electors of the township, town, or ward, in which he desires to manufacture or sell said liquors, that he is a citizen of the county and state, that he is of good moral character, and that they believe him to be a proper person to buy and sell intoxicating liquors for the purposes named in the preceding section.

SECTION 1528. He shall also make and file a bond to be approved by the auditor of the county where application is made, in the sum of three thousand dollars, with two or more sureties, who shall justify in double the

amount of said bond, conditioned that he will carry out the provisions of all laws now or hereafter in force relating to the sale of intoxicating liquors, and which said bond shall run in the name of the county for the benefit of the school fund; provided, that in case of a permit to manufacture intoxicating liquors, the penalty of the bond shall be five thousand dollars.

SECTION 1529. Upon the presentation of such certificate and bond to the county auditor a day shall be fixed by said auditor for the final hearing of the application by the board of supervisors, and notice thereof given by publication in at least one newspaper published in the county, or by posting such notice in the township, town, or ward, in which the business is to be conducted. Such publication or posting shall be at least ten days prior to the time of final hearing, and the applicant shall pay the expenses thereof in advance.

SECTION 1530. At such final hearing any resident of the county may appear and show cause why such permit should not be granted, and the same shall be refused unless the board shall be fully satisfied that all the requirements of the law have, in all respects, been fully complied with, that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality, and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood.

SECTION 1543. In cases of violation of the provisions of either of the three preceding sections, or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued or exists, and the furniture, fixtures, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish or continue, or use any building, erection, or place, for any of the purposes prohibited in said section, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars, and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of Chapter 47, Title 25, of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction, granted in such proceedings, shall be punished for contempt, by a fine of not less than five hundred, nor more than one thousand dollars, or by imprisonment in the county jail not more than eight months, or by both such fine and imprisonment in the discretion of the court.

This law was originally enacted in 1855, but the sections 1526 to 1530, both inclusive, were not applicable to manufacturers, nor did section 1543 authorize the suit in equity for the abatement of nuisances. The amendments extending the requirements as to permits to manufacturers and providing for the proceeding in equity were enacted in 1884.

The supreme court of Iowa held that the changes in the law made in 1884 were not material in determining the question as to the legality of the business carried on by Mr. Kidd, and construed the law as originally enacted in 1855 to forbid it.

It will be observed that there is nothing in the statute regulating in any wise the mere process of manufacture. There are no provisions as to the location of distilleries, the methods by which they shall be operated, the number or character of employes or the extent of the output. The bond required of the manufacturer is conditioned like that of the seller, only that "he will carry out the provisions of all laws now or hereafter in force relating to the sale of intoxicating liquors."

As to the matter in controversy, the court say:

> The sole question presented by the case is this: Under our statute, may intoxicating liquors be manufactured in this state for transportation and sale beyond its borders, without regard to the purpose of its use? Or, in other words, is the exportation out of the state a purpose for which intoxicating liquors may be lawfully made and sold?

The only evidence as to the disposition of the liquor were the statements contained in Mr. Kidd's reports that it was all for exportation out of the state, and that no liquor was sold to any person in the state of Iowa. For what use it was sold when exported does not appear. The court evidently deemed this to be immaterial, and held broadly that: "If the law be obeyed, no liquor will be manufactured for transportation. Its operation is to prevent the production of an article which might be lawfully transported out of the state."

The decision is, we think, plainly to the effect that the law absolutely prohibits the manufacture of alcohol for transportation from the state; it is certainly to the effect that it prohib-

its the manufacture of alcohol for transportation from the state unless when sold it is sold subject to the restrictions as to use imposed by the Iowa statute, without regard to the law of the place where the sale is made.

ASSIGNMENT OF ERRORS.

In the rendition of the said decree, and in its affirmance, error intervened to the prejudice of the said John S. Kidd, as will appear from the record, and among the errors so intervening are the following, viz.:

First. The said John S. Kidd was engaged in the manafacture of alcohol at and upon the premises of the International Distillery, and the alcohol manufactured was by him shipped to other states and foreign countries, and such manufacture was, by reason of said disposition of the product, adjudged to be illegal and a nuisance, and the said distillery was therefore ordered to be abated, and the said John S. Kidd forever enjoined from using or operating the same for the manufacture of alcohol.

Second. The said John S. Kidd was engaged in the manufacture of alcohol at the International Distillery, in the city of Des Moines, in said state, and the alcohol so manufactured was by him shipped to other states and to foreign countries, and it was held that the manufacture of alcohol, when carried on for the purpose of such shipment, was in violation of the statutes of Iowa, and said statute was held to be valid and not repugnant to the constitution of the United States, section 8, article 1.

Third. The said statute was construed to limit and confine the manufacture of alcohol in said state to such as was to be sold therein for medicinal, mechanical, culinary and sacramental uses, and to prohibit such manufacture for transportation or use outside of the state, and so construed, the said statute was held to be valid, and not repugnant to the constitution of the United States, section 8, article 1.

Fourth. The said statute of Iowa, as construed by the state courts, permits the manufacture of alcohol in said state when such alcohol is to be sold therein for medicinal, mechanical, culinary and sacramental uses; and prohibits such manufacture when such alcohol is to be shipped to other states or countries or is put to any other use, and so construed, the said statute was held to be valid and not repugnant to the constitution of the United States, fourteenth article of amendment thereto.

Fifth. The said statute of Iowa was construed to permit the manufacture of alcohol only when manufactured to be sold for medicinal. mechanical, culinary and sacramental uses, and to prohibit the manufacture when manufactured and sold without restriction to such uses, although sold and used in other states and countries and in conformity with the laws of such other states and countries, and so construed, the statute was held to be valid and not repugnant to the constitution of the United States, section 8, article 1.

The several holdings complained of as error are all essential to sustain the decree rendered herein.

We do not by our assignment of errors call into question the validity of the Iowa statute so far as it controls the manufacture of intoxicating liquors in its relation to the domestic traffic of the state; but it will be observed that the law as now construed by the state court, contrary to all its previous decisions, is not limited in its scope and effect by considerations of domestic necessity, but prohibits commerce with other states and foreign countries in what is by this very law recognized to be a useful commodity and the subject of lawful commerce.

So construed, the law is in violation of section 8 of article 1 of the federal constitution as a regulation of inter-state and foreign commerce, and it is also in violation of the fourteenth article of amendment, because this sweeping prohibition not

being required to serve any proper purpose of internal police administration operates to deprive the defendant of his property without due process of law.

I.

Alcohol is universally admitted to be a useful and indispensable commodity. For some purpose and to some extent, as a prime or subordinate element, it is used in nearly every art and manufacture. Next to water it is the most general solvent. In the manufacture of chemicals and drugs it is absolutely indispensable. The whole art of pharmacy, it may be said, is based upon the use of alcohol as a solvent.

It enters largely into the composition of paints, varnishes, perfumes, fine soaps, stearine candles, and many other articles of daily use. It is used in all dyeing and lacquering establishments, as a preservative in all museums, and as a fuel and cleansing material by jewelers, dentists, photographers and many other workers in mechanical arts. Its many beneficial uses in the sick room are well known and need not be recited.

The amount of alcohol annually required in this country for these and other like legitimate uses is variously estimated by good authorities at from nine to twenty millions of gallons.

The laws of every state in the Union and of every civilized country recognize the beneficial properties of alcohol, and all legislation touching the subject, whether prohibitory or restrictive merely, deals only with intoxicating liquors designed for use as a beverage.

The matter is well put in a report of a committee of the Massachussetts Legislature upon the first proposal for prohibition in that state:

> The sale of alcohol in its various forms, pure, mixed and combined, is, we believe, proper in itself and necessary for the public convenience; but, to be used as a beverage, it is never necessary—it is ever wrong, corrupting to the morals of the community, and tending to poverty, misery and crime. Alcohol is good; intoxicating drink is ruinous. This distinction, we think, should fully appear on the face of every statute.

Judge Field, in the Bartemeyer case, holds that alcohol is not peculiar in being thus subject to restrictions in its use by the police power of the state, but that "all property, even the most harmless in its nature, is equally subject to the power of the state in this respect with the most noxious." By other authorities it has been held that such laws were but legislative applications of the universal rule, *sic utere tuo ut alienum non laedas*. License laws equally with prohibitory laws are applications of the rule. The peculiar system of regulation which a state may adopt does not affect the character of alcohol as property.

The distinction between alcohol and intoxicating drink which the Massachussetts committee say should appear on the face of every statute does appear on the face of the Iowa statute.

We need not then here consider whether the state, if in its wisdom it should determine that alcohol is a thing so pernicious that the harm resulting from its manufacture and sale for any use is too great to be compensated by the benefits of such use, has the power to absolutely prohibit its manufacture and sale, even though as an incident to such a prohibition, the traffic in alcohol with other states and foreign countries would be prevented.

It would seem that so long as the laws of the United States recognize alcohol to be property and the subject of commerce among the states and with foreign nations, the states cannot by their action prevent such commerce in it; but that is not here involved.

The question presented by this case is: can a state prohibit traffic with other states and foreign countries in an article which it recognizes to be a useful commodity and the subject of lawful traffic among its own people?

The Iowa statute, as now construed by the supreme court of the state, attempts such a prohibition, and it is therefore a plain infringement of the exclusive authority of congress to regulate commerce with foreign nations and among the several states.

It is not in the power of a state to prohibit exportation of any commodity whatever. Section 8, of article 1, of the federal constitution, provides: "The congress shall have power to regulate commerce with foreign nations and among the several states."

The causes which led to the granting of this power are well known and need not be recited here.

As to certain subjects which are local in their nature, and affect commerce but incidentally, the state may make proper regulations, until congress acts with reference to them.

Where, however, the subject is national in its character, or of such nature as to admit of uniformity of regulation, the power of congress is exclusive of all state authority.

Welton vs. Missouri, 91 U. S., 275.
County of Mobile vs. Kimball, 102 U. S., 691.

That portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation.

Welton vs. Missouri, *supra*.
County of Mobile vs. Kimball, *supra*.
Brown vs. Huston, 114 U. S., 622.

The non-exercise of its power by congress is tantamount to a declaration that such commerce shall be free.

Welton vs. Missouri, *supra*.
Brown vs. Houston, *supra*.
Wabash Ry. Co. vs. Illinois, 118 U. S., 557.

We have only to consider, then, whether commerce in alcohol is included within the term "commerce" as used in the constitution.

In the *Passenger Cases*, 7 How., 416, it is said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."

In *Welton vs. Missouri*, *supra*, it is said that "the main object of that (inter-state) commerce is the sale and exchange of commodities."

No exceptions are admitted to this general character of commerce, as to the articles which may enter into it. Every species of property, everything which has beneficial uses and exchangeable value, is included. That alcohol is property, that it has value in use and exchange, is everywhere admitted.

In the License Cases, 5 How., 504, all the judges concurred in treating alcohol as property and commerce in it, as much as commerce in any other commodity, when carried on among the states or with foreign countries, as within the scope of the constitutional provision.

Ch. J. Taney said, pp. 576, *et seq.:*

It has, indeed, been suggested that if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficed in, but to be prevented, as far as human foresight or human means can guard against them. *But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and traffic, like any other commodity in which a right of property exists.* And congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may, therefore, admit, or not, as it shall seem best, the importation of ardent spirits. And, inasmuch as the laws of congress authorize their importation, no state has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorize it to be imported. *These state laws act altogether upon the retail or domestic traffic within their respective borders.* They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state.

Justice McLean said, p. 590:

That ardent spirits have been for ages and now are subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the states of the Union recognizes them to be.

Justice Daniel said, page 617:

The license laws of Massachusetts, Rhode Island and New Hampshire, now under review impose no exaction on foreign commerce. *They are laws simply determining the mode in which a commodity may be circulated within the respective jurisdictions of those states*, vesting in their domestic tribunals a discretion in selecting the agents for such circulation without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent. They do not interfere with it either in appearance or reality. They do not prohibit sales either by wholesale or retail. They assert only the power of regulating the latter, but this is entirely within the sphere of their peculiar authority.

In this respect the judges were all agreed. Judge Taney and those concurring with him did indeed hold that the laws involved regulated commerce as between the states, and that regulations of that character might be made by the states so long as congress failed to act. This, in view of later decisions, was not tenable ground. The other judges sustained the laws as to liquors brought from other states upon the same ground as that upon which they sustained the laws as to imported liquors, viz.: That they were domestic regulations purely, and affected only domestic commerce.

That intoxicating liquors are property and traffic in them as much as in any other species of property within the meaning of the term "commerce" in the federal constitution is plainly implied in *Beer Co. vs. Massachusetts*, 97 U. S., 25. It is there said very significantly, page 33:

Of course we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several states, or otherwise. *Brown vs. Maryland*, 12 Wheat., 419; *License Cases*, 5 How., 504; *Passenger Cases*, 7

id., 283; *Henderson vs. Mayor of New York*, 92 U. S., 259; *Chy Lung vs. Freeman*, id., 275; *Railroad Company vs. Husen*, 95 id., 465. That question does not arise in this case.

The supreme court of Iowa itself, in deciding a case arising under the very law in question, laid down the same doctrine.

The object of the act, of which the section referred to above is a part, is to suppress the manufacture, use of, and traffic in, intoxicating liquor, except for mechanical, medicinal, sacramental, and culinary purposes.

The traffic in such liquor, as an article of beverage, is prohibited; *but for other purposes it is recognized as an article of commerce, as other property*, though its sale in small quantities is guarded with certain very stringent restrictions.

Intoxicating liquor is the subject of property; the commerce in it as an article of beverage is unlawful, but its character as property is not thereby destroyed.

Monty vs. Arenson, 25 Iowa, 383.

Commerce in alcohol being within the constitutional provision, it remains to determine how far that provision is operative as a limitation upon the power of the states.

The License Cases settled definitely that a state could not in virtue of its police power prohibit importation of liquors from foreign lands, and the several states have since that time framed their enactments in this view. Imported liquors are not as a consequence exempted from all police supervision, but the power of congress and the power of the states are each given effect within their respective spheres. So long as the liquors retain their character as imports they are under the authority of congress; when they lose that character and become mingled with the general property of the state they become subject to its police restrictions.

Imports and exports stand upon the same footing. No warrant for any distinction between them can be found in either the letter or the reason of the constitutional provision.

In *Gibbons vs. Ogden*, 9 Wheaton, 1, Ch. J. Marshall said:

It has, we believe, been universally admitted that these words (commerce with foreign nations, etc.) comprehend every species of commercial intercourse between the United States and foreign nations. No sort of

trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

Yet the Iowa statute absolutely prohibits the exportation of the product of one of its lawful manufactures, or at least attempts to restrict its sale abroad by a limitation of the uses for which it may be there sold.

Whatever doubt may have once existed on the subject, it is now a settled doctrine that as to the paramount authority of congress commerce among the several states stands upon the same footing as commerce with foreign nations.

The states may not in the exercise of their many undoubted powers, as to tax, to pass quarantine and inspection laws, and needful measures of internal police, trench upon this authority. There is involved in this no impairment of the power of the States over purely domestic concerns, but there is involved and required by it a limitation of state interference to purely domestic concerns.

A consideration of some of the leading cases in which there was either a real or supposed conflict of state and national authority will serve to point out the rightful limits of each. Continuing his opinion, after what we have quoted above, in the case of *Gibbons vs. Ogden*, the Chief Justice said:

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration pre-supposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

* * * * * * * * *

This principle is, if possible, still more clear, when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them, and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. *The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states.* The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. *If, as has always been understood, the sovereignty of congress, though limited to specified objects,*

is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

In his application of these principles the chief justice held that the full power of congress to regulate commerce implied the whole power, and left no residuum, and that the states in the exercise of their undoubted powers to impose taxes, to pass inspection and quarantine laws, to regulate their domestic trade and police, must always act in subordination to the paramount authority of congress over commerce among the states.

The doctrine of this case was expressly approved in the Wabash case cited above, and from which we shall have occasion to quote hereafter.

There is no distinction to be found in the cases between commerce which originates within the state and that which originates without; that is, between exports and imports. They stand upon precisely the same footing. The sole question is whether more than one state is concerned.

A statute of California imposed a stamp duty on every bill of lading given for gold or silver transported from within the state to any point without, and it was held repugnant to the constitution of the United States as a duty upon exports.

Almy vs. California, 24 How., 169.

This is the only case in the books in which a state has discriminated against exports. As a rule, the states have been entirely willing to dispose of their surplus products wherever they could find a market for them.

In the case of the State Freight Tax, 15 Wall., 232, the question was as to the validity of a tax upon freights taken up in the state to be carried without. It was said, p. 274, *et seq.*:

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the state, or from points without the state to points within it, *or from points within the state to points without it*, the act is a regulation of inter-state commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. *The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states.* In his work on the constitution Judge Story asserts that the sense in which the word commerce is now used in that instrument includes not only traffic, but intercourse and navigation. And in the Passenger Cases it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the constitution was adopted.

Then, why is not a tax upon freight transported from state to state a regulation of inter-state transportation, and, therefore, a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has, in effect, declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. *Such an imposition, whether large or small, is a restraint of the*

privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines.

It must be remembered that the tax declared invalid operated equally upon freights that were wholly domestic and those that were inter-state. In other words, it was laid upon all freights carried by the roads in Pennsylvania. It was sought to be sustained at the bar as an exercise of the taxing power of the state, and as valid, because equally laid, and not discriminating against any class of freight. But the state was not permitted, in the exercise of its undoubted power to tax, to impose any burden upon commerce among the states, regardless of where it originated or where it ended.

The case of the State Tax on Railway Gross Receipts, 15 Wall., 284, did, indeed, seem to narrow very much the effect of the foregoing case, as it enabled the state to do indirectly what it might not do directly, but its authority is very much shaken by *Steamship Co. vs. Pennsylvania*, 122 U. S., 326, in which the first ground on which its decision was placed is held to be not tenable.

In *Robbins vs. Shelby County Taxing District*, 120 U. S., 439, the question was upon the validity of a law which prescribed that "all drummers and all persons having a regular licensed house of business in the district of Shelby county, offering for sale or selling goods, wares and merchandise, by sample, shall be required to pay to the county trustee the sum of ten dollars per week, or twenty-five dollars per month for such privilege." This law applied to all persons selling by sample within the taxing district, without regard to the residence or location of the persons or establishments for whom they were making such sales, and the law was sought to be sustained upon the ground that it was an exercise of the taxing power of the state, which fell equally upon all persons and property within its limits, making no discrimination against the citizens of other states, and yet it was held to be invalid because it was a regulation of inter-state commerce, operating as a burden upon such commerce, and the objection to it on

that score was not obviated by the fact that a like burden rested upon the purely domestic commerce of the state. The court holds:

> To say that the tax, if invalid, as against drummers from other states operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the state is not bound to tax its own drummers, and if it does so, whilst having no power to tax those of other states, it acts of its own free will and is itself the author of such discrimination. As before said, the state may tax its own internal commerce, but that does not give it any right to tax inter-state commerce.

The taxing power of the state is as broad and comprehensive as its power of police. The limitation of authority in each case is to purely domestic concerns. This, a consideration of the cases in which police regulations were involved will conclusively establish.

In *Hall vs. De Cuir*, 95 U. S., 485, the state law involved required all persons engaged as common carriers within the state to grant to all persons, regardless of race or color, equal rights and privileges to all parts of the cars, boats or other vehicles employed by them, and the supreme court of the state held that it applied to persons engaged in the transportation of passengers among the states. The law was held to be invalid, the court saying:

> But we think it may safely be said that state legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments, to be employed after coming within the state, but directly upon the business as it comes into the state from without *or goes out from within. While it purports only to control the carrier when engaged within the state it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.* His disposition of passengers taken up or put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodation of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route, is a necessity in his business, and, to secure it, congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in inter state commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans to Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. * * * As was said by Mr. Justice Field, speaking for the court in *Welton vs. The State of Missouri*, 91 U. S., 282, "inaction (by congress) is equivalent to a declaration that inter-state commerce shall remain free and untrammeled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, *seeks to take away from him that power so long as he is within Louisiana;* and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the

states, to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation it must come from congress, and not from the states.

In the Wabash case the question is exhaustively discussed, and all the cases are considered, and those cited by us approved. In concluding the opinion, the court say:

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute, it is not the province of this court to speak. *As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable*, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states, cannot be over-estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think, is clear, from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the congress of the United States, under the commerce clause of the constitution.

In *W. U. Telegraph Co. vs. Pendleton*, 122 U. S., 347, the attempted regulation by the state of Indiana of the mode in which the messages sent by telegraphic companies doing business within her limits should be delivered in other states, was held invalid as an impediment to the freedom of that form of inter-state commerce. The court said:

The supreme court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the state. Undoubtedly, under the reserve powers of the state, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace and protection of the community. The subjects upon which the state may act are almost infinite, *yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free*

exercise of the power vested in congress by the constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require.

Liquor laws are not peculiar in this respect among the police regulations of a state. So the Beer Company case distinctly affirms.

In *Tiernan vs. Rinker*, 102 U. S., 127, a statute of Texas was held inoperative because it made a discrimination against wines and beer imported from other states. In a like case, that of *Walling vs. Michigan*, 116 U. S., 459, it is said:

> It is suggested by the learned judge who delivered the opinion of the supreme court of Michigan in this case, that the tax imposed by the act of 1875, is an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. *This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature.* The police power cannot be set up to control the inhibitions of the federal constitution or the powers of the United States government created thereby. *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650.

The states cannot in virtue of this power, even where an exigency for its exercise arises, do whatsoever they please. It is, no doubt, for the states to determine whether or not the exigency exists, and to determine all questions of mere ways and means, so long as these are pertinent to the purpose and do not trench upon matters within the exclusive authority of the general government. Whether within its limits the state has wisely exercised its powers is not the subject of judicial inquiry, but whether it has observed those limits or has transcended them the courts must determine, or all constitutional limitations are to no purpose. The case of *R. R. Co. vs. Huzen*, 95 U. S., 465, is conclusive upon this point.

The law of Missouri there involved under pretense of quarantine regulation prohibited absolutely the bringing of certain cattle into the state during six months of the year, and at-

tached onerous conditions to such act during the remaining six months. The court say:

It seems hardly necessary to argue at length, that, unless the statute can be justified as the legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in congress. It is a plain regulation of inter-state commerce, a regulation extending to prohibition. *Whatever may be the power of a state over commerce that is completely iaternal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of inter-state commerce is undeniable*, and no attempt has been made in this case to deny it.

* * * * * * * * *

As was said in *Thorp vs. The Rutland & Burlington Railroad Company*, 27 Vt., 149, "it (the police power) extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property *within the state*. According to the maxim, *sic utere tuo ut alienum non laedas*, which, being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It was further said, that by the general police power of a state, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the Passenger cases, 7 How., 283, by Mr. Justice Greer, in the sacred law of self-defense; *vide* 3 Sawyer, 383. The same principle, it may be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self defensive.

But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the

federal constitution. It cannot invade the domain of the national government. It was said in *Henderson et al. vs. Mayor of the City of New York et al., supra,* to "be clear, from the nature of our complex form of government, that *whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the states.*" Substantially the same thing was said by Chief Justice Marshall, in *Gibbons vs. Ogden,* 9 Wheat., 1. Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exerted to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property, within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. *It may not, under the cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce.* Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In *Henderson vs. The Mayor,* etc., the statute of New York was defended as a police regulation to protect the state against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which was within the exclusive jurisdiction of congress. So in the case of *Chy Lung vs. Freeman,* where the pretense was the exclusion of lewd women; but as the statute was more far-reaching and affected other immigrants, not of any class which the state could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a state to protect herself against paupers, convicted criminals, or lewd women, by necessary or proper laws, in the absence of legislation by congress, *but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a state; but the constitutional doctrines they maintain are equally appli-*

cable to inter-state transportation of property. They deny validity to any state legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the federal government.

* * * * * * * * *

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel vs. Alexander*, 58 Ill., 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, these courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature, and not for the courts. *With this we cannot concur. The police power of a state cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion.*

City of New York vs. Miln, 11 Peters, 102, is the very outpost of the cases which have sustained the exercise of police power by the state where the commercial power of congress was involved. In the recent cases of *Chy Lung vs. Freeman*, 92 U. S., 275, and *People vs. Compagnie Generale*, 107 U. S., 59, the doctrine of the Miln case was not approved, and may be fairly said to be doubted. Still, we are willing to submit this case to its tests. The law there involved was held within the limits of the police power, because—

There is no aspect in which it can be viewed in which it transcends them. If we look at the place of its operation we find it to be within the territory, and, therefore, within the jurisdiction of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the legislature of that state are authorized and in duty bound to provide.

If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means by which these ends are proposed to be accomplished, they bear a just, natural and appropriate relation to those ends.

The cases cited have not any of them been overruled by the Kansas cases decided at this term. The commercial power of congress was not involved in these. The point ruled was simply that the fourteenth article of amendment did not operate to impair the police power of the states. The doctrine of the Huzen case, that the states, under cover of exerting their police powers, may not substantially prohibit or burden inter-state or foreign commerce, was not denied.

Under the laws of Iowa, intoxicating liquors are not *per se* a nuisance. The mere possession of them is not a crime. To make the possession criminal, it is essential that it be with intent to sell them *within the state*. Sec. 1523, Code of Iowa. Having a right to own and keep intoxicating liquors in the state, a person may take them out of the state, and by that act violates no law. Having taken them out he may sell them without offense, provided the sale is in conformity with the law of the place of sale. This is simply the equivalent of what he may do in the state itself. Owning and keeping the liquors without illegal intent, he is guilty of no wrong, and he may, without offense, sell in the state, provided he complies with the regulations prescribed for such sales. In the cases put, all police regulations are respected and any futher interference would be altogether in the nature of a commercial regulation.

Alcohol not being *per se* a nuisance, but recognized as property and as the subject of lawful commerce by the laws of the United States and of every state in the Union, to prohibit its transportation from one state, by one who has the legal right there to own and keep it, to another state, with intent there to sell it to a person and for a purpose authorized by the laws of that state, is to prohibit, to that extent, commerce among the states. It is prohibiting "the transmission of subjects of trade from the state to the buyer, or from the place of production to the market," which this court said, in the case of the State Freight Tax, it was absurd to suppose, was not contemplated by

the constitution, "for without that there could be no consummated trade either with foreign nations or among the states."

The peculiar quality of the commodity does not affect the constitutional principles involved. All commodities are subject to a proper exercise of the police power of the states, and all commodities in their relation to inter-state and foreign commerce are subject to the paramount and exclusive authority of congress.

The shipment of liquors from without the state to within it, was, in *Walling vs. Michigan*, held to be a matter of commerce among the states, and we take it for granted that a shipment from within the state to without is no less so. The rule of law applicable does not depend upon the direction of the shipment and change as that changes. If, so long as the state allows liquor to be sold within its borders, it cannot prohibit persons legitimately engaged in the traffic from buying liquors without and bringing them in, it must follow that it cannot prohibit the same persons from sending them out again. The state can not compel them to be sold in the domestic market any more than it can compel any other commodity to be so sold. In fine, there may be inter-state and foreign commerce in alcohol, initiating or terminating in any state which does not absolutely prohibit the traffic in that article. This the Kansas cases do not deny. Whether by reason of being brought from other states or from foreign countries alcohol may be sold even by the importer in the original packages otherwise than subject to the regulations of the state, we are not now contending. Neither do we here consider what regulations, if any, a state may impose upon the out-shipment of liquors to prevent evasion of its regulations of the domestic traffic. The commerce clause of the constitution is universally applicable, and is operative upon the state from which, no less than upon the state to which, a shipment is made. Otherwise, as was attempted in *Almy vs. California* and in the case of the State Freight Tax, a state could burden inter-state commerce by levying a tribute upon all outgoing products. States specially favored by nature,

like Pennsylvania, in the matter of petroleum and anthracite coal, or states possessing special facilities for manufacture, as those in which water power is abundant, could, and, we are warranted in saying, would, impose harsh conditions upon their less favored sister states. We are dealing with a question of power, with what may or may not be done by the states severally. For wise reasons, suggested not alone by foresight, but by sad experience, the representatives of all the states were vested with exclusive power to adjust the commercial relations of the states with each other and with foreign nations, and they alone have power to determine how far commerce with foreign nations and among the states shall be free, how far it shall be burdened and how far it shall be prohibited.

It will be said, however, that the question in this case is not whether the alcohol after it was manufactured could be shipped from the state, but whether it could be manufactured for the purpose of so shipping it. The difference suggested is one of form, and not of substance The manufacture of alcohol was not *per se* illegal. It was expressly authorized by the law. Now, unless the shipment was itself illegal, how could it make the manufacture so? Two acts, each lawful in itself, are not made unlawful when brought into conjunction, simply because of that conjunction. The act of transporting the alcohol from the state in the course of lawful commerce with other states not being a crime, the intent to perform that act was not a criminal intent, no matter when formed, whether before or after the alcohol was manufactured. If in the operation of this distillery there was a crime committed, it was committed by doing a lawful act, by lawful means, for lawful purposes. Such a conclusion discredits the premises from which it is derived. We confidently submit that Mr. Kidd could not, by force of the Iowa statute, be enjoined from the further pursuit of his business unless he had, either in the manufacture or in the sale of his product, done something which the state had prohibited and had authority to prohibit. It had not prohibited the manufacture, and it had no authority to prohibit the foreign sales.

The law here involved, so far as it regulates the domestic traffic in intoxicating liquors, provides fully for the occasion of its enactment. The people of Iowa cannot be injuriously affected by liquors that are taken out of the state. In the opinion rendered by the supreme court of Iowa in the present case it is said: "The evils flowing from intoxicating liquors arise wholly from its use as a beverage." These evils are effectually guarded against by preventing such use by the people of the state. The state does, indeed, owe a duty to the people of other states, and should not be indifferent to their safety and welfare. It is said in the opinion:

> Surely the state ought not to permit things to be done within its borders which subvert the peace, prosperity and good morals of the people of other states. No one will doubt that it is not only within the authority of the state to suppress conspiracies and combinations within her borders, intended to disturb the peace of a sister state, but that it ought to do so. And surely even counsel for defendant will not contend that the power of the state may not be exerted to prevent the impairment of the health or good morals of the people of another state, by the pursuit of business, or by acts done within our own state. Will it be for a moment contended that the state can not suppress the publication of obscene literature intended to be circulated exclusively in other states? Or may it not prohibit the manufacture, within the state, of unwholesome food, for transportation and sale in other states? Not alone do the true doctrines of constitutional law deny that the power of the state is so restricted—humanity, patriotism, inter-state comity, and Christianity all unite in protest against it.

This is admirable doctrine, and the court is right in saying that we do not contend against it. Conspiracies and combinations to do evil are in and of themselves criminal, wheresoever the evil is to be done, and are, therefore, properly punished where formed. The publication of obscene literature is wrong, no matter by whom it is intended to be read. So, too, is the manufacture of unwholesome food, whether for consumption at home or abroad. But such things, as Ch. J. Taney said of disease, pestilence and pauperism, "are not subjects of commerce. * * * They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them." When the state of

Iowa determines that alcohol is wholly bad, and forbids its manufacture, and the traffic in it by its own people, consistency at least, if not "humanity, patriotism, inter-state comity, and Christianity," will require that if possible it make no exception in favor of commerce with other people. It should not encourage a traffic in what is evil and only evil even with strangers, because of the profit to its own people. But the present case is very different. Alcohol may be lawfully made in the state of Iowa, and it may be lawfully sold therein, and this by virtue, not alone of natural and common law right, but of positive statutory sanction. And because nothing of this kind can be affirmed of conspiracies, obscene literature or unwholesome food, the analogy suggested by the court fails entirely.

Alcohol in itselt is useful, and therefore may be trafficked in. Men from weakness or perverted tastes may abuse it, and therefore it is a thing to be regulated. Every state of this Union and every civilized country recognizes these facts, and accordingly permits the traffic in alcohol and regulates it. Radically as these regulations may differ, they are inspired by a common desire to promote the well being of the people for whom they are enacted, and as a matter of judicial presumption they are each equally appropriate to that end. The regulations of many of the states of this Union are substantially like those of Iowa. This is notably true of Maine and Kansas. Is there anything inhuman, unpatriotic or unchristian in permitting alcohol to be made in Iowa for shipment to and sale in Kansas and Maine subject to the laws of those states? The question answers itself, for the laws of those states will allow it to be sold only for medicinal, mechanical and culinary purposes, for which purposes those laws and the laws of Iowa agree that it may properly and beneficially be used. It may be that the laws of New York allow a wider liberty to the people of that state and trust more to their capacity for self-government, but that cannot alter the legal status of commerce with that state. Nor is the moral aspect of the case changed for that reason. Iowa has no commission to act as guardian

for her sister state. The people of New York are as free to make their own laws as are the people of Iowa; they may be presumed to be as moral and enlightened. Whatever laws they have enacted in this behalf must be deemed sufficient to protect them as far as laws can do so against the evils incident to the use of intoxicating liquors. This being so, in what respect does traffic in alcohol with them differ from traffic in the same commodity with the people of Kansas or Maine? Alcohol shipped to New York must be sold subject to its laws. Some of it will be used in the arts and manufactures which have their seat in that state. Some of it, if the laws allow it, may find its way into use as a beverage. But this does not make evil the traffic so far as it supplies the arts and manufactures that have need of alcohol, nor does it charge with either legal or moral guilt the man who traffics in that commodity, because he cannot possibly impress upon it, in his contract of sale, any restriction which will be efficient to control its ultimate use. If the state of Iowa should determine that alcohol was wholly bad, not a subject of commerce, and therefore, not to be trafficked in and regulated, but to be prohibited altogether, it would follow in necessary sequence that the conversion of corn into alcohol would be an evil use to make of corn. In such view it would no doubt be competent for the state to prohibit the manufacture and sale of corn for such use, but such a restriction would not make corn any the less a subject of commerce, nor would it authorize the state to regulate or prohibit commerce in it with other states and foreign countries, notwithstanding in such other states and foreign countries it might be put to a use forbidden in the state of Iowa.

We are not dealing with a thing inherently and absolutely evil. This fact the court steadily ignores. Neither are we asserting any right to ignore the well being of the people of other states and foreign lands. We only say that the people of the several states having severally prescribed the regulalations essential to their welfare, any commercial intercourse

which respects these regulations in their respective jurisdictions is neither illegal nor immoral.

We concede what the court claims for the power of the state to suppress conspiracies, no matter against whom directed. We concede the power to suppress the publication of obscene literature, no matter where it is to be circulated. We concede the power to prohibit the manufacture of unwholesome foods, no matter upon whom they are to be imposed. These things are inherently and absolutely wrong. The common sense of mankind condemns them. Nothing can justify a toleration of them to any extent or for any purpose. But the power of a state to punish acts clearly criminal in themselves, when committed within its jurisdiction, does not include the power to prescribe the mode in which a useful commodity, the subject of lawful commerce, shall be dealt with in another state in relation to the domestic concerns of that state. The fault of the court's argument, its fundamental weakness, is that it does not distinguish between crime and commerce.

We admit the authority of the state of Iowa to punish crimes committed within its own borders, and we deny only what only is here involved, its authority to regulate commerce with foreign nations and among the several states.

The principles contended for by us have been recognized and upheld in a number of cases in Iowa arising under this very law, and were never denied until in the present case.

The keeping of intoxicating liquors, with no intent to sell them *within the state* contrary to law, is not forbidden by the statute for the suppression of intemperance (Rev., 1559). Intoxicating liquors in the possession of a citizen who holds them for the purpose of selling them lawfully within the state, *or for transporting them without the state, for lawful traffic*, are not, under the statute, subject to seizure (1525). To constitute the owning and keeping of intoxicating liquors unlawful, there must exist an intent to sell or dispose of them, *within the state*, contrary to law. In the absence of such intent, the possession of this kind of property is lawful. If lawful, the law must protect the possession. The petition of the intervenor avers that the liquors were not kept for the purpose of unlawful sale. His possession was, therefore, lawful, and the act for the suppression of intemperance does not authorize it to be disturbed.

Niles vs. Fries, 35 Iowa, 41.

In a later case the precise question in controversy was set was to recover the price of liquors made and sold by him to the defendant. The right to recover was denied upon the ground that the plaintiff had no permit to sell, and that the sales were therefore illegal. The plaintiff argued, that having the right to manufacture without a permit, the right to sell, in like manner, was implied; else the right explicitly granted would be nugatory. His manufacture, as a matter of course, was for the purpose of sale; and to deny or restrict the right of sale, was to deny or restrict the right to manufacture. Answering his arguments, the court said:

> In this case the plaintiff makes no claim that he had obtained such permission to sell, but he claims the right to sell simply because he is a manufacturer. The statute, however, as above quoted, in effect says, that no person shall sell intoxicating liquors until he first obtains permission. It therefore denies the right of a manufacturer to sell until he shall first obtain the permission in the manner specified. But it is argued that the right to manufacture necessarily carries with it the right to sell, since the latter is necessary in order to make the former of any effect; that without the right to sell, the right to manufacture is a barren right. If this were so, the argument would be potent, if not conclusive. It must, however, be remembered that the statute does not wholly prohibit the sale by the manufacturer, but simply regulates the manner in which he shall do it. The right of a manufacturer to sell is no higher than the right of the purchaser to sell - either may sell for the purposes specified, upon procuring the permission; but without such permission neither can sell. *Further than this, the right of export remains unlimited to the manufacturer and purchaser.*

Becker vs. Betten, 39 Iowa, 669.

Whether the decision in these cases is based upon the legislative intent, or upon a limitation of legislative power, matters not. In the one case it is a legislative recognition, in the other a judicial, of the soundness of our views. Nor is their force as authority broken by the statement in the opinion herein that the language quoted was mere dictum, or rather a *lapsus linguæ*, resulting from "the difficulty, indeed, the absolute

impossibility of always expressing decisions in language wholly accurate and in supporting them by arguments wholly sound."

The matter-of-course way in which these views were expressed shows that they were fixed as a habit, in the minds of the court. As precedents in Iowa these cases do, indeed, for the present stand as overruled by the decision in this cas , but as their soundness was denied by a bare majority, their weight as authorities in a tribunal not bound to follow the latest decisions of that court is not materially lessened.

It is claimed, however, that the state may absolutely pro hibit the traffic in intoxicating liquors, and that it may, therefore, do anything which is less than such absolute prohibition. That is to say, the state may prohibit all commerce in alcohol, domestic and external; it may, therefore, prohibit any part of such commerce, either the domestic or the external. We have no occasion to consider the claim of power to impose an absolute prohibition. because the consequences contended for by no means follow.

There is no such thing as arbitrary power in our system of government. Every function possessed by the state was conferred by the people, to be exercised in their interest and for their welfare, and it is limited in its scope by the necessity for its exercise.

An absolute prohibition of the manufacture and sale of alcohol involves a finding by the legislature that alcohol is wholly bad, and incapable of any good uses whatsoever. Such a prohibition being imposed, and in such a view, it may be that no exceptions could be claimed against it. That question is not in the case, and so we need not discuss it.

A prohibition upon the manufacture and sale of alcohol only for certain uses, involves a legislative finding that so far as not prohibited alcohol is beneficial, and hurtful alone when applied to the prohibited uses. This legislative finding is conclusive until reversed, and is binding upon the legislature itself; and it cannot by sheer force of authority do aught that is inconsistent therewith. This finding indicates the limits of the legisla-

tive power over alcohol, because it indicates the extent to which alcohol is hurtful to the state. To prohibit its manufacture, sale, or use beyond the requirements of the public welfare, is arbitrary and absurd, quite as much so as would be a like prohibition against the growing of corn or other staple production of the state.

The contrary argument proceeds in the view that the legislative authority is arbitrary and unlimited by either reason or justice, and it therefore fails to recognize and acknowledge the radical difference in kind that exists between absolute prohibition and mere restriction of use. The recognition of alcohol as a thing of good uses is a recognition of it as property, and the attributes and incidents of property cannot, therefore, be denied to it; nor would such a denial be an exercise of the same authority which imposed limitations upon its manufacture, sale and use.

What we are here contending for was the very point of the decision in *Preston vs. Drew*, 33 Maine, 558. The law of that state, like the law of Iowa, prohibited the manufacture and sale of intoxicating liquors as a beverage. It further declared, in unqualified terms, that no action should be maintained for the recovery of the possession of such liquors or their value. This declaration, literally construed, would prevent an action by a person who had lawful possesson of liquors, against one who had unlawfully deprived him of that possession. Considering that law as an arbitrary exercise of power, no reason exists why the declaration referred to should not be given the full effect imported by the ordinary meaning of the words employed. The supreme court of Maine, however, held that inasmuch as the law recognized alcohol to be property, the rights incident to lawful ownership of property in general could not be withdrawn from the lawful ownership of this particular species of property. They therefore limited this provision of the statute in its operation to liquors sold or held under such circumstances as to constitute them a nuisance, and said they must either do that or hold it to be unconstitutional altogether.

To this case, as well as to the case at bar, might have been applied the argument that if the state can prohibit altogether it can do anything whatever less than that, and, if the power in either case was arbitrary, the argument would be sound; but our government is not a despotism; the majority may not do what they please, but only what they determine to be right. The regulations imposed must be consistent with the principles upon which they are based and with the guaranties to individual rights secured, and the limitations upon state authority, imposed by fundamental law.

We again invite comparison with the limitations upon the taxing power of the states. These were carefully considered in *McCulloch vs. Maryland*. 4 Wheat., 316. Ch. J. Marshall there said:

> It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which government may choose to carry it.
>
> * * * * * * * * *
>
> The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right.
>
> * * * * * * * * *
>
> It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident.

See also—

Crandall vs. Nevada, 6 Wall., 35.

No more comprehensive scope than this has ever been assigned to the police power.

The power to tax, implies the power to destroy, as does the power to regulate, the power to prohibit, but the state cannot be permitted to exercise these powers, or either of them, to the destruction of, or interference with, interests confided exclusively to the care of the national authority.

It is furtner true that taxes can be levied only in aid of a public object, an object which is within the purpose for which governments are established.

Loan Association vs. Topeka, 20 Wall., 655.

In this case the court defined the principles of our government, and the relation of its powers to the rights of individuals, and emphasized the security of these rights against arbitrary interference by the state, in terms that are strictly applicable here:

> It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognizes no such rights, which holds the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power, which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

The precise application of these principles required by this case was made in *State vs. Saunders*, 19 Kan., 127. It was there held that even if a state had the absolute right to determine what should be property and what should not be, it could not, in virtue of that power, exclude from inter-state or foreign commerce, anything which it recognized to be property, although it might have effected such exclusion incidentally, and as an inherent and necessary consequence of determining that the thing was not property.

The right of a state to protect the game within its borders is undoubted, and, save by justice and the reason of the case, is unlimited. In the exercise of this right it may absolutely prohibit the killing and catching of game, because such a pro-

hibition may be imperatively demanded to avert the apprehended evil. This being so, it might be said, "Surely if the state can prohibit altogether, it can do anything less than that, and, therefore, can limit the catching and killing of game to the domestic uses of its own people, and prohibit its transportation from the state."

The case last cited presented just that question, and the supreme court of Kansas held the statute involved, which prohibited the exportation from the state, of game lawfully caught and killed, to be invalid as a regulation of commerce. The court say:

> For instance, a law which prohibits the catching and killing of prairie chickens may be valid, although it may indirectly prevent the transportation of such chickens from the state to any other state; *but a law which allows prairie chickens to be caught and killed, and thereby become the subject of traffic and commerce, and at the same time directly prohibits their transportation from the state to any other state, is unconstitutional and void.*

This argument, supported by these authorities, was employed in the state court, and the Kansas case especially read and urged with frequent iteration. That the illustration derived from the game laws is entirely apposite we may safely assume, because the state court used it in justification of their position. They say:

> But the use of property may be restricted *for purposes connected with trade* and other interests of the people. An illustration of legislation of this character is found in our game law, which forbids the transportation out of the state of any game killed within it. Yet the killing of game is permitted, with restrictions as to time and quantity or number killed. The sportsmen may lawfully kill the prescribed number within the lawful time. The game becomes his property; yet he cannot transport it out of the state. *We have never heard doubts expressed as to its constitutionality.*
>
> A little consideration will disclose its close similarity to the statute forbidding the transportation of intoxicating liquor.

This way of meeting an argument puts an end to the debate. When the express decision of the Kansas court, that such a law is unconstitutional and void, is disposed of without the scant courtesy of a passing allusion, and by the bald statement that "we have never heard doubts expressed as to its constitution-

ality," we are not answered, but overthrown by sheer force. This is the method of Dr. Johnson when "talking for victory," of whom Goldsmith said: "There is no arguing with him; when his pistol misses fire, he knocks you down with the butt end of it."

We have here a law which is justifiable only as a measure of domestic police. So far as it regulates the internal traffic in intoxicating liquors we make no question of its validity. Neither are we disposed to deny that the state might regulate the foreign traffic with a view to preventing its being employed as the means of evading the domestic objects of the law, if there should arise any danger of that sort. We do contend, however, that this law, as now construed, in so far as it prohibits all foreign commerce in intoxicating liquors while yet it recognizes such liquor to be the subject of lawful commerce, or in so far as it regulates that traffic as to the disposition of the commodity in other states and foreign lands, seeks nothing and accomplishes nothing that can promote the welfare of the people of Iowa; that it interdicts what is not contrary to the laws of any civilized state, and what on the other hand is everywhere regarded as lawful commerce, and that it is therefore simply a regulation of inter-state and foreign commerce, and as such is unconstitutional and void.

It is claimed, however, that even if alcohol may after it is manufactured be freely exported, nevertheless the manufacture for such exportation may be prohibited because that is a purely domestic process, begun and completed within the state, and therefore absolutely subject to its authority.

It is urged in support of this view that perhaps the legislative intent was to affect the manufacture *per se* and to limit that to the utmost possible extent, and that this would be a valid exercise of police power. It will be further argued that as this might have been the legislative purpose we can not be heard to argue against the possibility. The object of all statutory interpretation is to ascertain the legislative intent, and no inquiry is so frequently made by the courts in construing statu-

tory enactments as that concerning the evil to be remedied. As to prohibitory legislation the courts everywhere concur in this. The evil to be remedied is that of intemperance, and the method of the law is, instead of acting upon each individual citizen and attempting directly to regulate his personal habits, to do so mediately and more easily and economically and with less interference with personal freedom, by acting upon the limited class who undertake to furnish alcohol for use as a beverage. This does involve a limitation upon the manufacture correspondent with the limitation upon the sale. That we admit to be within the constitutional scope of the statute. We admit that alcohol can not be lawfully manufactured for an unlawful use or disposition, but we insist that for any use or disposition which may lawfully be made of it, alcohol may lawfully be manufactured

The statute indicates no purpose to impose any restrictions upon the manufacture, save such as are incidental to its purpose of prohibiting the use of liquor as a beverage. It imposes no restrictions save such as inhere in the restrictions upon the sale. It does not attempt to limit manufacture in place, mode or amount. It may be carried on in city or country. It may be conducted by any mode known to the craft. It may be carried on to any extent which lawful commerce will justify. Minors as well as adults, habitual drunkards as well as persons of sober habits, may be employed to assist in the manufacture.

That manufactures may *per se* be the subject of regulation, nobody denies. But the reason for such regulation wherever it has been attempted is obvious. There may be, incident to the process, noxious smells, and the generation of poisonous gases, as in the case of rendering and fertilizing establishments. There may be danger of fire or explosion, as in the manufacture of burning fluids or explosive powders. In all these cases the provisions of the law are adapted to reducing the peculiar perils of the trade to a minimum.

The sole danger from alcohol is in its use. That our law

has guarded against. If in the mere existence of a distillery there was peril, it would be provided against by seclusion. If, in the process of distillation, there was physical harm to employes, precautionary measures would be adopted; if moral harm, some restriction upon the age, habits or character of the persons employed. In fact, however, the sole restriction is that which grows out of the diminished use in consequence of its prohibition as a beverage. If harm were apprehended from the manufacture itself, that harm would attend equally upon manufacture for lawful sale within the state as upon manufacture for lawful sale without. Two ways of providing against such harm would suggest themselves. Either the manufacture would be conducted under appropriate checks and guards, or it would be prohibited altogether. Whether the last mode would be a valid exercise of state power as long as alcohol was permitted to be sold and used we do not believe, but that we need not here consider. We have to do here only with the adaptability of means to the supposed end. The absence of all appropriate means conclusively proves that the legislature had no such end in view as regulating the mere manufacture.

The state court say that the evils flowing from intoxicating liquor arise wholly from its use as a beverage. As the law attempts not directly to inhibit that use, but indirectly by inhibiting the sale for such use, we may say that it is the sale alone which the law has in view. From that all the apprehended evils flow, and the sole reason for imposing any restrictions upon the manufacture is, that all manufacture is for purpose of sale, and carries with it the right of sale, and therefore a limitation is imposed upon it correspondent with that upon the sale. The commerce and the manufacture stand upon the same footing. Whatever commerce is lawful, manufacture to supply that commerce is also lawful.

From all the legislation of all the states, and from all the adjudication upon such legislation by the courts, we challenge the citation of another instance wherein the limitations upon the production of an article which might be hurtful in use, were

broader than the limitations upon the sale. In every such case either the sale alone is regulated, or the regulations of the manufacture are subordinate to, and consonant with, those upon the sale. For the first time is broached the proposition that there may be lawful traffic in a commodity, and yet not lawful production of the commodity for that traffic. A proposition so novel and so at variance with the whole history, policy and method of the police power should not be admitted upon fanciful and far-fetched speculation. Within the limits of lawful disposition of the product, the manufacturer may extend his establishment as he pleases. Many manufactures are under police regulation, but these regulations are never of a quantitative character. If the process of manufacture may be attended with evil, the regulations of the law have reference to the process, but never to the extent of the output. If the product may be perverted to hurtful uses, the regulation is against the use.

Under whatever class of regulations the manufacture may fall, conforming to them, it may be carried on to whatever extent the requirements of lawful commerce may justify, and any regulation in denial or limitation of that right is a regulation not of manufacture, but of commerce, and must be considered in that view.

Granting, therefore, that the state did intend a limitation upon the manufacture of alcohol considered merely as an industrial process, it would have no authority to effect that limitation by a restriction to manufacture for domestic uses. The state court say:

> A manufactory of steam boilers for sale and transportation without the state is established within the residence portion of a city of this state, with dwellings of citizens adjacent thereto. Now, under the doctrine advanced by counsel, as the purpose of the owner of the manufactory is to produce articles for inter-state commerce, the nuisance can not be abated under the laws and authority of the state, for the reason that the abatement would be the enforcement of regulations of commerce, a subject exclusively within the authority of congress. Surely, it will not be contended that the authority of congress reaches to this extent.

Surely enough it will not be so contended. But the court while assuming to have hit the bull's eye, have absolutely missed the target.

That the manufacture of boilers may be regulated without regard to the destination of the boilers when completed is conceded. The controverted question is: May the manufacture be regulated solely because of that destination and only with a view to that? To permit a boiler factory within the residence portion of a city would be an occasion perhaps of peril and certainly of annoyance to the adjacent dwellers. The state has ample power to secure its citizens against this evil by requiring the isolation of the factory. But whatever regulation it adopts must have reference exclusively to the process of manufacture and not to the character of the traffic in the finished boilers. It would require an acute mind to discover greater peril or greater annoyance in the manufacture of a boiler intended for shipment to a foreign country than in the manufacture of one destined for use in the very town in which it was made. The state court did not attempt to point out the difference.

We are not contending for a discrimination in favor of manufacture for external commerce but against a discrimination against such manufacture. A regulation of the mere process of boiler making concerns only the people of the state, and may therefore be valid as a regulation of domestic police, but a regulation which looks only to the sale of the boiler when completed is a commercial regulation and if restrictive of interstate or foreign commerce is beyond the authority of the state and void.

The court assumes that commerce is not in any wise identified with manufacture, but is an independent concern, and that, therefore, there can be no regulations of commerce save such as operate upon commodities after they are actually started in the course of sale or exchange. They say:

The prohibition of the statute is directed alone to the manufacture of intoxicating liquors for purposes other than for sale according to the provisions of the statute. Code, Sec. 1524. If the law be obeyed no liquor will be manufactured for transportation. Its operation is to prevent the production of an article which might be lawfully transported out of the state. Now, commerce consists in the interchange of commodities or property which is the subject of trade. It does not consist of the impossible interchange of things not in existence. There must be articles of trade before commerce can exist. *How, then, can it be said that the statute, by prohibiting the manufacture of an article of trade, regulates commerce?*

If this position be well taken the constitutional provision invoked by us is rendered absolutely nugatory. What is the difference between saying, "You can not export corn," and "You can not raise corn for export?" It is very like the old case which the magistrate held to turn upon the question whether the accused had called to the prosecuting witness, "McCarthy, come out of the house!" or "Come out of the house, McCarthy!" There is no difference between a prohibition upon export and a prohibition upon manufacture for export.

The object of all labor is to supply the wants of the laborer. In civilized society, however, labor alone cannot accomplish this object. There must be exchange of the products of labor. Commerce is industry. It is in every just sense a part of the purpose and process of production. The commodity must not only be made, but it must be brought to the consumer, and the cost of this is added to the price paid by the consumer for the commodity. So, too, industry, save that limited amount of labor which in the very performance gratifies an ultimate want, is commerce. It is the prospect of exchange that incites to labor and determines its direction and extent. Commerce and industry are thus essential parts of one great plan. The ligament that binds them together is vital to each. What affects the one, affects the other. Nevertheless, regulations that go to the mere modes or processes of industry have but an incidental effect upon commerce, and the power to make them, in so many cases vitally essential to the welfare of their people, was not withdrawn from the states. But regulations that in

terms limit the purposes for which and the markets in which the products of labor may be offered in exchange are commercial regulations, and it is a mere quibble to speak of them as anything else.

For the law to allow the production and manufacture of commodities without limitation save that they shall be produced or manufactured only for the necessities in use of the people of the state, is simply to prohibit commerce in such commodities with other states and foreign countries; and if that power exists as to one thing it exists as to all.

Industry and commerce are not to be absolutely isolated. Because the federal constitution does not in terms assert any control over production and manufacture as such, it will not do to say that the states have absolute power over them, and may therefore limit them in their commercial relations so long as the mandate is operative only upon the producer or manufacturer and punishes him in case of disobedience, not, indeed, because of the disposition he makes of his product, but only because he had such disposition in view when he produced it.

Examples are numerous in history, and when the constitution was framed such examples were recent, of nations prohibiting the exportation as well as the importation of commodities, and it the beneficent provisions of that instrument, intended to secure the freedom of commerce with foreign nations and among the states, can be evaded by the palpable sham of a prohibition, not, indeed, upon such commerce, but upon industry with a view to such commerce, the wisdom of the fathers did not fathom the cunning of the children.

The constitution was intended to secure matters of substance, and not of mere form. When it gave to congress the full control of the external commerce of the states, it designed to withdraw all power over such commerce from the states, and not merely to limit in form or mode the exercise of such power. An evasion of the constitutional provision is no more to be tolerated than an open violation.

In *Salzenstein et al. vs. Mavis*, 91 Ill., 391. it was sought to sustain a provision of the Illinois statute against the ruling in *R. R. Co. vs. Huzen*, 5 Otto, 465, upon the ground that the Missouri statute held void in that case prohibited the transportation of Texas cattle into or through the state, while in the case at bar the prohibition was upon the ownership or possession of such cattle in the state. The court say, page 401:

> We cannot, however, understand how the right to transport and bring into this state Texas cattle can be exercised, if the owning or possessing such cattle within the state is prohibited. The right to transport from another state into this state necessarily includes the right of possession and ownership in this state. If the latter is prohibited, the former right must fall with it. If the legislature has the constitutional right to declare that a person shall not possess or own a certain kind of property within the state which may be raised or produced in another state, of the Union, it logically follows that all inter-state commerce in such property is both regulated by the legislature and also prohibited. *We do not understand that the legislature can do indirectly that which the constitution of the United States prohibits to be done, directly.* Such, however, would be the case if the theory of the plaintiff in this case was sanctioned.

The effect of the Illinois decision is simply that the right to import existing, every other right exists which is necessary to make that of avail. Export and import stand upon precisely the same footing. If the right to export exists, so does the right to buy and to produce for that purpose.

In *ex parte* Cummings, 4 Wall., 325, it was sought to sustain the statute involved because it did not in terms infringe the inhibition against *ex post facto* laws and bills of attainder. The court, however, held:

> The legal result must be the same, for what can not be done directly can not be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. * * * If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. * * * To make the enjoyment of a right dependent upon an impossible condition is equivalent to a denial of the right under any condition.

Precisely what we contend for has been repeatedly held by this court, when the taxing power of the state was involved.

In the case of the State Tax on Railway Gross Receipts the tax there imposed was likened to a tax upon goods which had been imported after their original packages had been broken and they had been mixed with the mass of property in the country. Commenting on this, in *Steamship Co. vs. Pennsylvania*, 122 U. S., p. 341, the court say:

> This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as suggested? *When the latter become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages.* When mingled with the general mass of property in the state they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held, in *Welton vs. Missouri*, 91 U. S., 275, that goods brought into a state for sale, though they thereby became a part of the mass of its property, cannot be taxed by reason of their being introduced into the state, or because they are the products of another state. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. *If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of inter-state or foreign commerce, no matter when the tax is exacted, whether at the time of realizing his receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it.* A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in *Brown vs. Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it.

Almy vs. The State, 24 How., 169, was apparently decided on the ground that the tax involved was invalid as a tax upon exports, but in *Woodruff vs. Parham*, 8 Wall., 138, it is said the

case was well decided on the ground "that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another." That it was levied not directly upon the thing itself made no difference, its practical effect was considered and because this was operative upon and discriminated against commodities destined for external commerce it, was held void.

In *Brown vs. Maryland*, 12 Wheat., 269. Ch. J. Marshall said:

> But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person.
>
> *The state, it is said may tax occupations and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing.* All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This, the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This, the state has not a right to do, because it is prohibited by the constitution.

It is true that in using this language immediate reference was had to the clause of the constitution prohibiting a duty on exports, but the principles of construction remain the same and besides, the same line of reasoning, although not expressed in the same terms, was employed, when in the same case the commerce clause came under consideration.

In *Welton vs. Missouri* and in *Robbins vs. Shelby County Taxing District* the same evasion was attempted. It was argued that the tax was levied not upon commerce but upon industry; that it was an exercise of the same authority, in virtue of which the state taxed the occupation of a hack driver, lawyer

or physician. If the industries of a state can be considered apart from their relations to commerce, the argument in favor of the tax is without a flaw. In the first case the court meet this claim squarely and say:

> Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. *If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.*
>
> * * * * * * * * *
>
> The power of a state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows, would follow, from the action of some of the states.

These cases establish that a regulation of industry in its relation to commerce is a commercial regulation and is to be so considered, no matter by what indirection it is imposed. That the state is not restrained from making such regulations by the fourteenth article of amendment may be true, but that is nothing to our present purpose, which is to determine the effect of the commerce clause.

The proposition must be maintained broadly that the state may by limitations imposed upon the commercial purposes for which production is carried on, effect the entire destruction of its external commerce, or the law here in question must be limited to its domestic traffic. We are concerned to know if a power exists and not whether it has been reasonably exercised. Authority is removed above the necessity of giving reasons and needs not even to resort to Falstaff's shift of declining to give them on compulsion.

But let us consider the matter narrowly, as it will be put in support of this law, and that is, that alcohol is susceptible of

evil uses, that the danger therefrom is increased with the increase of its production, that therefore the state may limit that production in whatever manner seems to it best, and that it has done so in the present case by limiting it to the domestic necessities of its people. But this statement of the case involves the assumption so often denied by this court, that the police power of the states is above the commercial power of congress. Conceding the wisdom of the restrictions that the state has imposed on the use of alcohol, and supposing that every state in the Union followed its example, would it be competent for the states severally to prohibit the manufacture of alcohol intended to be beneficially and legitimately used in other states?

In the exercise of undoubted *power* the state of Iowa has regulated the mining of coal. Mining is on many accounts a hazardous pursuit. There is danger from the falling in of roofs, from fires, from floods and from foul atmosphere, and with the utmost precautions that the ingenuity of science has suggested and the power of the state has enforced, many lives are annually lost. The peril to health is constant; it inheres in the very conditions under which the industry is carried on, under ground, in dampness and in darkness. Is it competent for the state in the exercise of its police powers and for the sake of exposing as few of its people as possible to the perils of this pursuit, to limit the operation of mines to its own demands for consumption?

Factory life is attended with many evil features, and the resources of statesmanship are constantly drawn upon for checks and safe-guards against them. The smoke and dust and dirt amidst which manufacturing must be carried on, the confinement that is entailed, are all hurtful to the health. Social evils there are too, endangering the peace and security of the state. The large amount of capital required in nearly every branch of manufacture, under present economic conditions, gives an undue advantage to employers too often abused, and there follow strikes and lock-outs with a long train of disastrous consequences. Can this exigency be provided for by limiting all manufactures to the requirements of home use?

The same control that may be exercised over mining and manufacturers may be exercised over agriculture. Could those who believe that such a policy would be wise, upon any pretense, prevent the exportation of products of the soil for the sake of encouraging the home growth and home manufacture of all things needed by the people?

If the states severally were sovereign, they could undoubtedly do any or all these things, and it may be that the fourteenth article of amendment does not forbid them if accomplished by laws of uniform operation. But the states are not sovereign, and there exists many other limitations on their powers.

That danger which results from the manufacture and sale of useful and necessary commodities is an incident to all industry. None of the various pursuits to which our complex civilization has given rise, is free from it, although it does not attend upon all in equal degree. A sovereign state, considering only its own people may, therefore, with respect to all things, limit their activities to their own necessities, and of the discrimination involved no complaint can be made. Such a policy of exclusion inflicts perhaps more evil than it prevents, but that is a consideration for the legislative branch of government. But the states of our country occupy a relation to each other which implies common interests and mutual obligations. Things absolutely pernicious any state may absolutely prohibit, but things useful it only regulates. In making these regulations it cannot proceed without regard to the other states. It was competent for the state of Missouri to provide against the spread of contagion amongst its cattle and therefore to quarantine against diseased or infected animals, wheresoever brought from. In doing this, however, it could not ignore altogether the interests of other states, as was attempted in the Huzen case, and exclude altogether the bringing in of cattle from those states. This would indeed be a very effectual provision against contagion from such a source, but no degree of peril, however great, no demand of self interest, however urgent, could justify the resulting discrimination. When a state, in the regulation

of its industries, instead of confining itself to those checks and safe-guards which relate to their modes and processes, and to such restrictions upon the disposition of the products, as relate to its own internal traffic, ignores the needs of other states, and limits the industry to its own uses, it discriminates against such other states, in a matter wherein the constitution declares their interests to be common. If there is peril in the manufacture of alcohol for necessary uses, that peril to the people of the United States will be lessened by a concentration of the industry at a few points. The same is true of other manufactures. What a state loses by making any particular thing beyond its own requirements, it more than gains by being thus enabled to acquire by exchange other needful things equally injurious to manufacture. If it be argued that the state is not bound to promote the interests of other states by express provisions of law, it remains none the less true that it cannot prejudice those interests by express enactments, and this it does whenever it imposes retrictions upon the intercourse of its own people with the people of other states.

It was to prevent just such isolation of interest and such selfish legislation by the states that the whole power over their external commercial relations was reposed in congress, and congress has declared that there shall be no impediment to the "transmission of subjects of trade from the state to the buyer, or from the place of production to the market."

The supreme law of the land establishes this commercial freedom, and state legislation cannot impair it. The basis and justification of commercial freedom among the states is the unity of their industrial interests. Differences of natural resources and popular characteristics do indeed result in diversity of pursuits, but not in conflict of interests. The states may not act with reference to each other as aliens. As constituent elements of one nation they must seek their prosperity in harmony with each other. It is to the general welfare that productions and manufactures of every kind should be carried on to their fullest extent, wherever by favor of nature and the genius of the peo-

ple they may be carried on cheapest. This being done, the freedom of commercial intercourse secures to each citizen of the United States the fullest possible reward for his labors.

In Iowa, coal and corn are abundant and cheap, and for that reason, alcohol may be manufactured there to good advantage. The arts and manufactures in which it is used are carried on principally in other states, and this, too, is determined by consideration of economic advantage. As water always tends to its level, so all productions and manufactures tend to the place of lowest cost, although this may be remote from the place of greatest demand for the product itself, and thus industries intimately dependent upon each other are widely separated in point of distance. Interference with the freedom of commercial intercourse by one state may therefore affect disastrously every state in the Union.

All property is held and must be used subject to the police power of the state, and if that power goes to the extent decided by the supreme court of Iowa, no authority remains in the United States, or in this court, to control its action, however unreasonable or oppressive.

Every state in the Union then can, as the result of separate state action, be compelled to manufacture its own alcohol, however much more advantageous it would be to secure it by exchange. In like manner coal could be excluded from the general commerce of the country. The fact that some of the states have no coal measures, can have no bearing on the question if the states in their industrial affairs may pursue a selfish and exclusive policy.

The commerce of every state depends upon its industries. The state court says tritely enough "that commerce consists in the interchange of commodities or property which is the subject of trade. It does not consist in the impossible interchange of things not in existence. There must be articles of trade before commerce can exist." With this we have no fault to find, but mark the conclusion: "How, then, can it

be said that the statute by prohibiting the manufacture of an article of trade regulates commerce?" But the statute does not prohibit the manufacture of the article of trade in question, but on the contrary, authorizes it. The article of trade is, by lawful means, brought into existence, and not less than two thousand merchants in the state are every day dealing with it under sanction of law in the regular course of domestic traffic. So we are not contending for the impossible interchange of things not in existence, but are contending against a prohibition of the very possible and entirely lawful interchange of things actually existing. Such a prohibition is a regulation of commerce and such a prohibition the law imposes, none the less because it does not punish a past shipment, but renders upon it the verdict of "not guilty, but you must not do it again," and enforces this very peculiar judgment by preventing further manufacture.

To such a power, if it exists, no limitations can be assigned. Whatever is within the state is subject to its control, and it may by confining the industry and enterprise of the people to their own immediate needs, preclude all commerce with other states and foreign countries. And when we get at the bottom of the matter we find the exclusive policy to be grounded not upon "humanity, patriotism, inter-state comity and christianity," but upon narrow, selfish motives—upon the principle of "every man for himself, and the devil take the hindmost." When the presumption is once admitted that the industrial interests of the states are hostile to each other, there will be erected barriers to the freedom of commercial intercourse more effective than custom houses. Legislation will consist of measures of retaliation and reprisal, and local interests and local jealousies will mar the broader patriotism of the Union, and disturb the harmony of that arrangement which makes us "many as the waves, but one as the sea." This is no vain foreboding. A long line of cases may be cited from the records of this court to justify the prediction. We need but repeat what is said in *Welton vs. Missouri:* "All the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other

states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states."

We have considered this question at such length, rather because of its importance, than because of its difficulty.

There is no complaint in the case of the location of the distillery, no complaint of the mode or process of manufacture, no complaint that alcohol was sold in Iowa, contrary to its laws, no complaint that alcohol was anywhere sold in violation of law; the only complaint and the sole cause of offense is the intent on the part of Mr. Kidd to embark with the product of his industry in lawful commerce with other states and foreign countries. That intent was not a guilty one, nor can it be made so until such commerce is made a guilty commerce, and this must be done, if at all, by congress, which under the constitution has exclusive power to prescribe "the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

II.

The statute contravenes the fourteenth article of amendment to the constitution, which enacts, "Nor shall any state deprive any person of life, liberty or property, without due process of law."

The International Distillery is property. Its value consists wholly in use. If it is limited in its operation, its value is correspondingly limited. If it is condemned to idleness, it is rendered absolutely worthless.

Substantial effect will be given to the terms of the amendment, and it will be extended in its operation, as well to cases where the use of property is unwarrantably restricted, as to cases in which property is actually appropriated by the state.

Pumpelly vs. Green Bay Co., 13 Wall., 177.

It will be claimed that all property is held subject to whatever regulations are or may be presented by the police power of the state, but if this be true, it is with the limitation that the regulations are necessary and reasonable. There must be an emergency calling for the regulation. Of this, it may be that the state is the sole judge, but it cannot be controverted that whatever its judgment, it is as binding upon the state as upon its citizens. Beyond the reasonable requirements of the emergency found by the state to exist, it cannot go even as to persons and property within its jurisdiction. It has been declared in Iowa that the use of intoxicating liquors as a beverage is under all circumstances hurtful to the people, and that such use ought to be prevented. So far as the statute imposes a prohibition upon the manufacture and sale of liquors to be used in the state as a beverage, it does not transcend the limits of legislative discretion. The same is true of the restrictions thrown about the manufacture and sale for use within the state for the four beneficial purposes recognized by the law. To go beyond this, however, is to go beyond reason, and beyond the bounds of rightful authority.

Precisely in point is the case of *Preston vs. Drew*, 33 Maine, 558. The prohibitory law of Maine was there involved. That law, like the law of Iowa, prohibited the sale of liquor for use as a beverage, and surrounded the sale for beneficial uses with the most stringent regulations. Among other provisions of the law was one which declared that:

> No action of any kind shall be had or maintained in any court for the recovery or possession of intoxicating or spirituous liquors or the value thereof.

The court felt bound either to limit the section quoted in its application to liquors held for purpose of illegal sale, or to declare it void. They did the former, saying:

> The court cannot decide by an application of the rules of the common law, or by the provisions of the act, *that property cannot be acquired in spirituous and intoxicating liquors.* The language of the act, which declares that no action shall be maintained for the recovery or possession of such liquors or their value, is without limitation; and, by a literal construction, it

would deprive one who has purchased them of a town or city agent, for allowable purposes, of the right to maintain an action to recover them or their value from a person who had taken them from his possession without any right or authority, or who had wantonly destroyed them. It would also deprive the town and city agents of all rights to maintain an action for the recovery of such liquors which had been purchased by them for sale according to the provisions of the act, and which had been unlawfully taken from them or destroyed. It would also deprive a person of all remedy for the protection of such property by action, when procured for his private use and not intended for sale; and when he was carrying it through the state without any intention of sale within this state. Can one conclude that an intelligent legislature could have intended to hold out such temptations for the lawless subtraction or destruction of private property? The results are too extraordinary and unjust to allow an intelligent and considerate mind to believe that they could have been foreseen and approved.

The general language must, therefore, be restricted so as to accomplish the general intent and declared purpose of the act without producing such results, or the provision, now under consideration, must be pronounced to be a plain violation of the provisions of the constitution, and void. The general intent and declared purpose of the act would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which was liable to seizure or forfeiture, or intended for sale in violation of the provisions of the act.

It may be said, that a court of justice is not authorized to introduce by construction such a limitation; that it savors more of legislation than of construction. It may be so ; *and if the court may not introduce any such limitation without encroaching upon the forbidden province of another department of the government, it cannot omit its duty to declare that provision to be in violation of the provisions of the constitution, and void.*

The state of New York passed an act forbidding the manufacture of cigars in tenement houses. The purpose of the act, as disclosed by its history, was to protect persons employed in shops and factories against competition from those working at their homes. This, of couse, did not appear on the face of the act, and the act was sought to be maintained purely as a measure of police. In *ex parte, Jacobs* 98 N. Y., 98, it was held to be unconstitutional. as depriving the person affected of their property, through impairment of its use, without due process of law.

All the questions here presented were passed upon in that case. The authorities are exhaustively examined, and the case is so well reasoned throughout, that we cannot refrain from liberal quotations.

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used Its capability for enjoyment and adaptibility to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

* * * * * * * * *

But the claim is made that the legislature could pass this act in the exercise of the police power which every sovereign state possesses. That power is very broad and comprehensive, and it is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *salus populi suprema lex est.* It is used to regulate the use of property by enforcing the maxim, *sic utere tuo, ut alienum non lædas.* Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency engendering overruling necessity, property may be taken or destroyed without compensation and without what is commonly called due process of law. The limit of the power can not be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks its voice must be heeded. It furnishes the supreme law, the guide for the conduct of the legislators, judges and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto.

* * * * * * * * *

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen,

or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to, promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law.

* * * * * * * * *

The general government is one of limited powers particularly specified in the federal constitution. But, in addition to the powers granted, it is provided in the constitution that congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Under this provision congress is not the final judge of what is "necessary and proper," but its laws must have a legitimate end in view, must be within the scope of the constitution, must be appropriate and plainly adapted to that end, and not prohibited by, but consistent with, the letter and spirit of the constitution; and whether the laws passed under the implied powers contained in the section cited are of the character mentioned, and thus justified, is always open to judicial inquiry. (*McCullock vs. Maryland*, 4 Wheat, 316, 321; *Hepburn vs. Griswold*, 8 Wall., 603; Legal Tender Cases, 12 id., 457; 110 U. S., 421.) If it were for congress to determine when these implied or incidental powers should be exercised, its powers would be without any restraint, and instead of being a body with limited powers, it would, in its own discretion, have general and unlimited power of legislation. "Whatever meaning," says Mr. Madison (1 Ann. of Cong 1848), "the clause of the constitution conferring all necessary and proper means to carry into effect the enumerated powers, may have, none could be admitted that would give an unlimited discretion to congress." And in *Marbury vs. Madison*, 1 Cranch, 137, Chief Justice Marshall says: "To what purpose are limitations committed to writing, if those limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed."

These citations are apt to show how the police power may, and how it ought not to be exercised, and how far its exercise is subject to judicial inquiry. A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health.

* * * * * * * * *

When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health

is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void. In reaching this conclusion we have not been unmindful that the powers which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by Chancellor Kent (1 Com. 450): "It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights."

The New York statute is an illustration of what may be expected when once the claim of arbitrary and absolute power on the score of police necessity is conceded to the states. In the sacred name of labor, the rights of labor were impaired, and under pretense of promoting the general welfare, in the interest of one class, a weaker class was stricken down.

The property here involved, like all other property, may be used and enjoyed by its owner to the fullest extent compatible with the general welfare. The state may so restrict its use that it will not be hurtful to its people, but no more. All has been done that needs to be, or that lawfully can be done when the uses to which the products of its operation may be put in the state of Iowa are defined.

Outside of Iowa there is a market to which the owner may gain access, and in which he may make lawful disposition of his goods. That is a right as sacred to him as the right of the farmer to ship his grain to Chicago or Liverpool for sale. For five years the property here in question has been used. The manner of its use concerns the state so far as relates to the disposition of its product. What that has been for the last half of that period is shown by the evidence, to the details of every transaction. The law of Iowa has been obeyed, and as well the law of every other state with which dealings have been had. To deny the owner the right to operate his establishment for lawful sale in the markets of this state, and for lawful sale in the markets of other states, is the sheer wantonness of power, the unprovoked insolence of authority. Our institutions recog-

nize nothing of the sort. We hold our rights by a tenure more secure than individual strength. The constitution is the pledge of all the people to each individual that he shall be deprived of his rights against his will only by due process of law. To this pledge every power of the state is subordinate, and by that pledge there is imposed upon the power here claimed to be absolute, the limitation that it shall be exercised not unreasonably nor arbitrarily, but only for the general good, by means appropriate and restricted to that end.

The difference between the cases in which prohibitory legislation by the states has been sustained and this, is broad and fundamental. To the modes of procedure established by the statute to enforce its mandates, we make no objection. We do not question that the state may make changes in its policy of domestic police, and prohibit a use of property theretofore lawful without making compensation for the resulting impairment of value, if the action of the state is in itself within the range of its admitted powers. Neither are we concerned to determine how far a state may proceed in the direction of socialism and prescribe for individuals a rule of conduct in matters of purely private right. We object to the action of the state here involved that it is separatistic in its aims and results and destructive of that national unity which the constitution of the United States was designed to secure and promote.

The authority of a state over its people and their property is confined to the range of domestic affairs. Within that range it may be absolute, but it cannot be carried beyond and interfere with rights and duties growing out of national relations and affecting national interests.

National integrity is guaranteed by the federal constitution. That was the very purpose of its framers. Something more than mere territorial unity was intended; something more than an alliance offensive and defensive. These existed before. It was intended "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense,

promote the general welfare, and secure the blessings of liberty" among the people of the United States forever.

The maintenance of this more perfect union and the attainment of the purposes for which it was formed, imply a common interest among all the people, and forbid all hostile or exclusive legislation by the states. They demand that the intercourse of the people of the states with each other and with foreign nations, shall be independent of state authority and subject only to national control.

Narrow interpretations of the commerce clause have always been rejected. The purpose of the constitution has always been kept in view, and laws challenged as violating it have been considered less with regard to their mode and place of operation than with regard to their effect. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." In the *Passenger Cases*, 7 How., 407, the claim of authority made on behalf of the state was denied to be valid, upon the ground that its exercise "would enable a state to establish and enforce a non-intercourse with every other state." Such is the effect and declared purpose of the Iowa law as to one of the subjects of legitimate traffic, and if state action can affect non-intercourse as to one commodity it can do so as to all.

In *Crandall vs. Nevada*, 6 Wall., 35, the decision was based upon no special clause of the constitution, but broadly upon the national character of the Union. "The people of these United States constitute one nation." This fact gives to the general government certain rights over the individual citizen which the states cannot impair, and gives to the citizen correlative rights which are "independent of the will of any state." For this reason the state cannot prevent its people from freely passing and repassing its boundaries upon the business of the general government, or upon their own business with the peo-

ple of other states and foreign lands. That right of free transit, to be of practical use, must attach to their property as well, and that it does so is placed beyond doubt by the commerce clause. These external business relations which they may lawfully create, and whose obligations they may lawfully discharge, they may as lawfully have in mind in the exercise of their avocations within the state. The freedom of commercial intercourse, essential to harmony of growth and development within the Union, is destroyed if the state may interfere at any point, whether it be at the point of production, transportation or exchange. At whatever stage in the processes of industry the interference operates, the effect is the same; it enforces non-intercourse between the states, and violates in letter and spirit, in form and substance, the fundamental purpose of the constitution.

The law of Iowa prohibits its people from practicing a lawful industry, when they intend thereby to supply, through the channels of lawful commerce, the lawful wants of the people of other states and foreign countries. Such a prohibition impeaches the national supremacy and impairs the national integrity, and is, therefore, unconstitutional and void.

BENJAMIN HARRIS BREWSTER,
F. W. LEHMANN,
Of Counsel for Plaintiff in Error.

Campbell Printing Company, Des Moines.

Office Supreme Court U. S.
FILED.
MAR 31 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD, Plaintiff in Error,

vs.

I. E. PEARSON AND S. J. LOUGHRAN, Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

Brief and Argument for Defendants in Error.

C. C. COLE and

JOHN S. RUNNELLS,

For Defendants in Error.

DES MOINES:
P. C. KENYON, LAW BRIEF PUBLISHER,
1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD,
Plaintiff in Error,
vs.
I. E. PEARSON AND
S. J. LOUGHRAN,
Defendant in Error.

Writ of Error to the Supreme Court of Iowa.

BENJAMIN HARRIS BREWSTER AND F. W. LEHMANN,
Attorneys for Plaintiff in Error.

C. C. COLE AND JOHN S. RUNNELLS,
Attorneys for Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

This is an action in equity, instituted by the defendants in error for an injunction to restrain the plaintiff in error from the manufacture of intoxicating liquors contrary to the law of the state of Iowa.

The alleged violations began with the month of July, 1884, and continued until the filing of the bill in December, 1885.

The answer denies generally the allegations of the bill, and pleads that during the period of the alleged violations the plaintiff in error was empowered by the proper authorities to manufacture and sell intoxicating liquors, except as prohibited by law.

The testimony offered upon the trial included successive permits granted to defendant by the board of supervisors of Polk

county, embracing the entire period of the alleged violations, and also the monthly reports of the defendant to the county auditor, which showed the manufacture and sale of large quantities of alcohol and high wines and other forms of intoxicating liquors.

The reports showed the quantities manufactured and to whom sold, but they failed to disclose whether or not they were for mechanical, medicinal, culinary or sacramental purposes, or for either of them, but instead thereof, and in the column set apart to designate the purpose for which the liquors were manufactured and sold, there appeared only the words, "All for exportation outside of the state of Iowa," or the words, "For export only." Except as thus explained, the reports failed entirely to disclose the purpose for which the liquors in question were manufactured or sold.

Upon the trial the court found that the equities were with the complainant, and that the allegations of the bill were sustained; that the defendant had been and was now engaged in the illegal manufacture of intoxicating liquors; that no part of the product of his manufacture was required by the wants of the locality in which his business was carried on, and that it was not necessary and proper for the accommodation of the neighborhood in which it was conducted.

It was, therefore, decreed that the defendant should be perpetually enjoined from manufacturing intoxicating liquors upon the premises in question.

The provisions of the law of Iowa under which this action was instituted and which have been construed and sustained by the courts of that state, are clearly defined with respect to the manufacture of intoxicating liquors. Section 1523 of the Code provides:

> No person shall manufacture or sell by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided. * * *

Section 1525 prescribes a penalty for a violation of the law by manufacturers, as follows:

Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months; and on his second and every subsequent conviction for said offense he shall pay a fine of not less than five hundred dollars, nor more than one thousand dollars, and costs of prosecution, and be imprisoned in the county jail one year.

Section 1526 defines who may be permitted to manufacture under the law, and for what purpose the manufacture may be carried on, as follows:

Any citizen of the state, except hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners, is hereby permitted, within the county of his residence to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows.

Sections 1527 and 1529 provide for the manner of obtaining the permit, and section 1530 sets out the conditions under which it may be granted. It is as follows:

At such final hearing, any resident of the county may appear and show cause why such permit should not be granted; and the same shall be refused, unless the board shall be fully satisfied that all the requirements of the law have, in all respects, been fully complied with, that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood.

The manufacturer, like the seller, is required to make monthly reports to the county auditor, the evident purpose of the requirement being to show whether or not the holder of a permit was manufacturing or selling in compliance with the law. The section which so provides, 1537, is as follows:

No person having a permit to sell intoxicating liquors under this chapter shall sell the same at a greater profit than thirty-three per cent on the cost of the same, including freights; and every person having such

permit shall make, on the last Saturday of every month, a return in writing to the auditor of the county showing the kind and the quantity of the liquors purchased by him since the date of his last report, the price paid, and the amount of freights paid on the same; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, for what purpose and what price; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, for what purpose and what price; also the kind and quantity of liquor remaining on hand; which report shall be sworn to by the person having the said permit, and shall be kept by the auditor, subject at all times to the inspection of the public. And the provisions of this section shall apply to persons holding a permit to manufacture intoxicating liquors, so far as the same relates to the report; and any such manufacturer shall, within the time specified for parties holding a permit to sell, also report the quantity and kind of liquors by him manufactured since the date of his last report, and also the quantity and kind of liquors sold by him, and for what purpose and to whom sold.

Section 1543 provides for the proceeding in equity to enjoin unlawful manufacture, as follows:

SECTION 1543. In cases of violation of the provisions of either of the three preceding sections, or of section fifteen hundred and twenty-five o this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued or exists, and the furniture, fixtures, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish or continue, or use any building, erection, or place, for any of the purposes prohibited in said section, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of Chapter 47, Title 25, of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction, granted in such proceedings, shall be punished for contempt, by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the county jail not more than eight months, or by both such fine and imprisonment in the discretion of the court.

The purpose of these statutory provisions is evident. The legislature of the state intended thereby to absolutely prohibit

all manufacture of intoxicating liquors which was not confined to the four purposes enumerated in the statute, and whether or not the manufacturer should be permitted to carry on his business even for these purposes is required to be determined by a "consideration of the wants of the locality," the "number of permits already granted," and whether or not "such permit would be necessary and proper for the accommodation of the neighborhood." Not only did the legislature so declare in positive and unmistakable language, but in order to guard against the possibility of intentional or unintentional evasion, it provided that a complete history of the transactions of the manufacturer should be made matter of public record.

It will be observed that the manufacturer is required to state explicitly for *what purpose* the liquors are sold, and as the law distinctly says the manufacture may be carried on "for mechanical, medicinal, culinary, and sacramental purposes *only*," it must mean that the authorized sale which is to be defined in the report is for one of these four enumerated purposes. Within these limits, and upon compliance with the law with respect to the obtaining of a permit, the manufacture may be and is legal; outside of and beyond these limits no manufacture of intoxicating liquors can be carried on in the state under the law.

The supreme court of the state construed the statutes quoted to prohibit absolutely within the state the manufacture of intoxicating liquors for export. The question involved in this case is whether or not these statutes, so construed by the highest court of the state, are in conflict with section 8, article 1 of the Federal Constitution, as being a regulation of inter-state commerce, and also in violation of the fourteenth article of amendment.

I.

The fact that intoxicating liquors are an article of commerce does not deprive the state of the right to prohibit their manufacture.

At the outset of the discussion we decline any controversy respecting the uses and necessities of alcohol. That it has a recognized place in commerce, in domestic life, and in the arts may be readily admitted. In this respect it occupies a common plane with opium, strychnine, powder and the volatile oils. Like them it is a necessity, a convenience, a subject of trade and a source of profit.

We deny strenuously, however, that any presumption attaches to the manufacture or sale of alcohol in favor either of its utility or necessity.

The statistics of its manufacture show that ninety-five per cent of all the manufactured product, in some of the manifold forms for which it is manufactured and into which it is converted, is for use as a beverage. More than two-thirds of the states in the union have recognized in their statutes the fact that alcohol in its various forms has other than scientific and medical uses, dangerous to the welfare of their people.

Plaintiff in error seems to rest his case upon the proposition that because alcohol is property and is the subject of commerce and passes as a subject of sale from state to state, and in the present case is manufactured in Iowa and sold in other states, it is not competent for the state of Iowa to prohibit its manufacture. He claims that such prohibition is in contravention of section 8, article 1, of the federal constitution, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states."

That the question is not altogether free from difficulty we readily admit, and yet the difficulty is more apparent than real. We cannot believe it to have been the purpose of the framers

of the constitution to extend the provision quoted beyond its fair and evident intention.

Commerce has been well defined by this court to consist in "selling the superfluities and purchasing articles of necessity, as well as productions and manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."

Passenger Cases, 7 Howard, 416.

In another case it is said the main object of that (Inter-State) law is the sale and exchange of commodities.

Welton vs. Missouri, 91 U. S., 275.

Now, unless the fair construction or logical intendment of the constitutional provision quoted be that it deprives the state of the right to regulate anything which may become a subject of commerce, then surely no argument can be drawn therefrom tending to sustain the theory that the state may not prohibit the manufacture of what it shall hold to be deleterious.

The natural sense of the provision is not in accord with plaintiff's construction of it. In terms it is limited to a protection of commerce. It says nothing of production or manufacture. Its purpose does not go back of the ripened product or completed article. It is a fair presumption that if it had intended to throw the mantle of its protection over the processes of growth or manufacture, it would have so declared.

But it does nothing of the kind. It leaves to the state the right to determine what things shall be produced, and how they shall be produced. It assumes, and wisely assumes, that every sovereignty shall determine for itself what may be grown and what may not. Would there not be something monstrous in the proposition that because the depraved appetite of a small portion of one community shall desire and is willing to buy and pay for what can be made in another community, this fact alone is a prohibition upon the legislature to restrain or inhibit the man-

ufacture of such an article? Is the right of commerce higher than the right of self-preservation? We think the statement of the proposition implies its own denial. While it may be true that the hand of the state must be withheld from interference with an article which commerce is carrying from its source in one state to its destination in another, yet it surely cannot be claimed that this restriction of its power involves a limitation upon the right of the state to say what shall be grown or shall be made within its own territory. The right to sell does not necessarily involve the right to manufacture.

A thousand incidents suggest themselves in which the sale of a thing may be harmless, of which the manufacture is a nuisance. The sale of perfumes is a legitimate branch of trade, ministering to the senses of many, and doing injury or harm to none. But the production of many of the elements which enter into them is poisonous, injurious to the health of the community, and excluded from the places where many people dwell together. The sale of colored fabrics supplies a reasonable and just demand of the community. But the manufacture of the dyes which impart to them their color, and even the processes of dyeing itself, poison the air, are injurious to the health and are subjected to the most stringent police regulations.

It surely will not be claimed that the duty of non-interference with inter-state commerce by the state goes so far as to require the state to guarantee the production of the materials for commerce. Because the state can not interrupt commerce itself involves no duty that it shall not interfere with the production of the articles of commerce, provided the law-makers shall be satisfied the production of those articles is injurious to the health or the morals of its people.

This court has definitely settled the question that imports from another state are proper subjects of supervision.

The License Cases, 5 Howard, 504, determined that intoxicating liquors brought from another state into one which regulated

their sale are not exempted from the operation of the statute by virtue of the fact of their importation. The moment they are placed within the jurisdiction of the state they become subject to its laws and their owners liable to its penalties.

Counsel for plaintiff in error say: "Imports and exports stand upon the same footing. No warrant for any distinction between them can be found in either the letter or the reason of the constitutional provision."

Upon this proposition we are entirely in accord, but if this be true, and imports are subject to the police regulation of the state, and their sale may be prohibited, how can it be claimed that the exported article before it shall leave the state is not subject to like supervision and control?

If it be within the sanctions of the constitution to prohibit the sale in New Hampshire of a barrel of gin imported from Massachusetts, can it be successfully claimed that Massachusetts may not prohibit the manufacture of gin within its territory? Does one prohibition involve the exercise of a larger power than the other? Are they not to the same degree, and to no greater degree, each an interference with the transmission of the commodity from the one state to the other?

But it is urged by plaintiff's counsel that, the act of shipment being a legal act, and protected by the constitution, the intention to perform that act, including the act of manufacture, cannot be made a crime. In support of this proposition it is alleged that the manufacture of alcohol is not illegal. It is this wrongful premise which has misled counsel in his conclusion. The legislature of Iowa, in language plain and positive, has put its ban upon the business of plaintiff in error. It has declared in substance that no one shall be permitted to manufacture intoxicating liquors within the borders of the state, except upon clearly expressed conditions.

The testimony in this case discloses that plaintiff in error has manufactured not in accordance with these conditions and in

violation of the law. Fortunately no dispute can arise as to the facts in the case. Plaintiff's admission is that he has manufactured intoxicating liquors for export, regardless of the purposes for which his product is used. He confesses to have carried on a business in the territory of Iowa for an external demand only—a business which the legislature of the state has declared to be fraught with peril to its people and has therefore prohibited. If the position of plaintiff in error be grounded upon the law, then an industry may be forced upon a reluctant people for the exclusive benefit of another community. The people of Iowa, against their protest, expressed with all the solemnity of the statute, will be compelled to submit to what they have decided to be wrong, in order that some other people in another state may derive advantage therefrom.

But it is said they do permit the manufacture of intoxicating liquors for some purposes and that this fact prevents them from prohibiting its manufacture for export. We fail to see reason or plausibility in the argument. The state has not only the right to prohibit but the right to regulate. Its power ofregulation is as clear and undoubted as its authority to prohibit. If it be true, as stated in the Beer Company case, 97 U. S. 32, that all rights are held subject to the police power of the state, surely there can be no question about the right of the state to exclude an offensive or deleterious manufacture from its borders. It may consent, in the exercise of its sovereignty, to submit to an evil to a limited extent, basing its submission upon the exigencies of a great necessity. It may recognize and yield to some imperative want of its people, although the gratification or satisfaction of that want be not without its peril, while at the same time it may insist that it shall not be compelled to satisfy a like want of another people. It surely ought to be permitted to say that it shall not be rendered a workshop against its will or be made a laboratory to its harm.

Much stress has been laid upon the fact that the thing per-

mitted in this case is not "inherently and absolutely evil." It is claimed that the supreme court of Iowa has ignored this fact. But who shall say that it is not inherently evil?

Mr. Justice Grier, in sustaining the prohibitory legislation involved in the License Cases, says:

> It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery and pauperism and crime which have their origin in the use or abuse of ardent spirits.

Mr. Justice Woodbury says in the same case of the same legislation: "Its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime."

Mr. Justice McLean speaks of prohibitory legislation as the product "of a great moral reform."

Whatever may be the opinion of the wisdom of the prohibitory legislation — and we admit the opinions of good men differ widely upon the subject — there is no difference of opinion as to the existence of the evil which this legislation seeks to remedy.

To say that the very small per cent of alcohol which enters into the arts, or the uses of medicine, takes it out of the category of evils is to claim a manifest absurdity. Nineteen-twentieths of all the alcohol that is made finds its way into some form of beverage. Surely the remaining twentieth will not redeem it from classification as a thing "inherently and absolutely evil."

We are challenged by plaintiff's counsel to answer the proposition that the limitations upon the production of an article are never broader than the limitations upon the sale. The challenge is meaningless for the purposes of this discussion, unless it implies that it is not competent for the state, in the exercise of its police power, to prohibit the manufacture of a thing of which it permits the sale.

Gunpowder is permitted to be sold, and commerce in the article between citizens of different states could not be constitutionally restricted by the power of the state. But surely its

manufacture may be, and is, subject to the most stringent regulations, amounting oftentimes to absolute exclusion.

Dynamite is an article of commerce, and, under certain limitations, is freely permitted to be sold. But when we come to the question of its manufacture, we find it hedged about by the severest restrictions and the most expensive conditions.

In short, there is no such relation between the manufacture and the sale of an article as requires that their legal conditions shall be the same.

The one may be injurious and be prohibited or restricted; the other may be without harm and be entirely free. Each is to be regulated or not by reference to its own conditions, peculiarities and effect. The state is entitled to the presumption that it will prohibit nothing and restrict nothing out of which good may come to its people unless there be harm to the public disproportionate to the profit to the individual. All powers exercised by the sovereign authority are presumed to be lawfully exercised until the contrary be shown.

And yet plaintiff's counsel are heard to appeal in this court from the judgment of the legislature of the state, interpreted and confirmed by its court of last resort, against the wisdom of its prohibitory laws. It is said that in Iowa coal and corn are abundant and cheap, and for that reason alcohol and intoxicating liquors may be manufactured there to advantage. Concede this to be true, and yet plaintiff is confronted by the fact that the state is willing to forego all the advantages accruing from this position in order that it may protect its people from what it claims to be a great danger. No stronger argument can be adduced against plaintiff's position than the fact that the legislature of the state, occupying an elevated standpoint, from which it is presumed to regard not simply the interest of one industry, but of all industries; not simply the material advantages, but the moral and spiritual health of its people, determines upon a full and fair consideration of the question, that

whatever profit may come from the manufacture of its corn into alcohol is dearly bought, and too dearly bought, by the weakening of the public conscience and the injury to the public morals therefrom. There are other considerations of weight, even in political economy, than those of dollars and cents. A people morally strong has the best equipment for that national prosperity to which all constitutions, statutes and natural resources are but ministers. There is an economical as well as a spiritual pertinence in the inquiry: What shall it profit a man if he gain the whole world and lose his own soul? And what shall it avail a nation to secure a favorable market for its coal and corn at the sacrifice of its sense of right and wrong?

Who shall determine when the police powers of the state may be invoked? Who is to be the final arbiter of the justice of their exercise? Where is vested the power of determining whether or not by their exercise in a given case the state transcends the limits of its authority? These are questions of frequent possibility, and the courts have again and again been called upon to answer them. A review of the authorities in which they have been considered would be alike unsatisfactory and unprofitable. It is sufficient for the purposes of the present case to say, that while they are not absolutely in accord, yet the greater and better weight of authority supports the view that the state is invested with the largest power in determining when it may be necessary to exercise its police powers for the public good; but it must always exercise them with due regard to the limitations imposed by the constitution. While it is true, as laid down in the Beer Company case, that "all rights are "held subject to the police power of the state," yet it is equally true that that power cannot be wantonly and arbitrarily exercised. Statehood exists for the promotion of the welfare of the people. It is meaningless and purposeless if it be not empowered to do whatsoever may be necessary to promote the public good. To accomplish this end it is invested with the

largest powers and has jurisdiction over an infinite variety of subjects.

Governments have always been swift to guard against evils which assail the physical health and strength of their people. And with advancing civilization and a more enlightened appreciation of their duties, they have been constantly extending the range of their legislation to more and more efficiently protect the moral health of their people. And, while it is true that they may not, in seeking to accomplish any of the manifold objects to which the exercise of their police powers has been directed, encroach upon reserved constitutional rights, yet it has always been true that the courts have reluctantly interfered to declare that the judgment of the legislature was wrong in assuming to make too broad an exercise of its authority. It was said by this court in the *Sinking Fund* Cases (99 U. S., 718):

> It is our duty, when required in the regular course of judicial proceedings, to declare an act of congress void if not within the legislative power of the United States. *But this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute*, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degreee on a strict observance of this salutary rule.

This question was also considered by this court in the case of *Mugler vs. State of Kansas*, decided at the present term. In the able and thorough discussion of the question presented in that case the court says:

> By whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety.

The court then states it to be true that not every statute is to be accepted as a legitimate exercise of the police powers of the state, but that it must determine in a given case whether or not the legislative judgment has been wrongly exercised, or has resulted in an invasion of the rights secured by the fundamental law.

But in the same opinion it says:

> And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is the best and safest for the community, to diregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

Apply these principles to the present case. Plaintiff in error claims that the state of Iowa, by its law prohibiting the manufacture of intoxicating liquors, imposes a limitation upon commerce between the states. The state declares that all dealings in intoxicating liquors, whether of manufacture or sale, are detrimental to its interests. It declares that the manufacture of intoxicating liquors "would tend to cripple, if it did not defeat, "the effort to guard the community against the evils attending "the excessive use of such liquors." In the exercise of its best judgment it asserts that such manufacture is inconsistent with the idea of prohibition, and therefore cannot be permitted.

In the Mugler case the court says that statutes purporting to have been enacted to protect the public health, the public morals and the public safety "must have a real or substantial relation to those objects." They must be fairly adapted to the accomplishment of the end in view. This is the only limitation suggested by the court upon the exercise of power by the state, save, of course, that it never must be inconsistent with the fundamental law of the land. Now, who shall say that the statute in question is not fairly and reasonably designed to accomplish the end in view?

The right of the state to prohibit the manufacture of intoxicating liquors for sale within its own borders is not controverted. The right of the state to so regulate the manufacture of such liquors as to limit it exclusively to certain indispensable purposes, is likewise not disputed. But it is claimed that it has no right to prohibit manufacture for export, because, forsooth, such prohibition is not reasonably adapted to the end of promoting the health or morals of its people.

To us this seems a very partial and limited view of the matter. How long would the public sense be likely to condemn as wrong that which the law-making power of the state should approve as right? What must be the necessary effect upon the moral sense of the community, of the state sanctioning that to be done for other communities which it has condemned as wrong for its own? How far removed, in logical sequence, from the right to manufacture intoxicating liquors for sale outside of the state, is the right to manufacture intoxicating liquors for sale within the state?

If legislation had in it no element of right or wrong, we should be swift to concede the force of plaintiff's position. If the making of the laws for a great community, involving their health, their happiness, their physical and moral welfare, were simply a matter of money making, like the running of a bank or the operation of a silver mine, then the legislature ought

only to consider how the greatest gain can be made from the resources of the state. Fortunately, however, this low conception of legislative duty is rarely entertained. The legislature of Iowa decided that prohibition was a laudable end. Consistently therewith it decided that it must prohibit the manufacture for the purposes of general sale, either within or without its borders, of the thing whose sale it prohibited wherever its authority extended under the severest penalties.

II.

The prohibition of the manufacture of intoxicating liquors is within the police powers of the state.

The prohibitory law of Iowa recognizes a distinction between the manufacture and the sale of intoxicating liquors. While the provisions of the law with respect to obtaining a permit either to manufacture or to sell are the same, yet it is nowhere recognized in the law that the granting of the permit to do the one involves the concession of the right to do the other. Section 1523 of the Code provides that "no person shall manufacture or sell" except as hereinafter provided. But there is a distinct provision, to-wit, section 1525, providing for the punishment of any one who shall manufacture in violation of law, and the bond which the manufacturer is required to give is a different bond from that required from the seller. The statutes of this state, therefore, draw a plain line of demarcation between the manufacturer and the seller, which should not be obliterated or overlooked in any intelligent discussion of the rights of either. Manufacture is to be distinguished from sale. They differ no less in respect to the legal rights and obligations of the two than they do in their practical operations. Any argument, therefore, which confounds the two, or which, ignoring the penalties and prohibitions upon manufacture under the law in Iowa, considers and discusses only the rights, privileges and immunities of the seller, must in the nature of things be

partial and misleading. It is not enough to establish either by reason or authority that the commerce in intoxicating liquors between citizens of different states is protected by the federal constitution, and then, assuming this principle to have been established, to infer that the claim of the state to prohibit the *manufacture* of intoxicating liquors must be denied, because, forsooth, the right of manufacture can no more be denied than the right of sale. If the operations of manufacture and of sale be distinct in fact, or if the right to sell does not necessarily involve the right to manufacture in the state, or if the right to manufacture in the state does not necessarily involve the right to sell to citizens of another state, then the argument that the right of manufacture for sale to citizens of another state is protected by the provisions of the federal constitution, and that the law is invalid if it interferes with that right, plainly falls to the ground.

For this reason we are unable to accept as conclusive the very elaborate argument of plaintiff in error upon this branch of the case. That argument seems to assume that the primary purpose of the present action is the prohibition of the *sale* of intoxicating liquors by the defendant outside the state. All of the authorities cited, we believe without exception, are applicable to this theory and to this only. They are uniform in holding that it is not within the power of the state to pass such laws as will impose any disabilities upon any *legal* traffic between the states. All this may be admitted to the fullest and broadest extent claimed by plaintiff in error, and yet the reasoning, we think, fail to reach, touch or determine the question involved in the case at bar.

The fundamental question in this case is this: "Is it, in the proper exercise of its police powers, within the power of the state to regulate, restrain or prohibit the *manufacture* of any article within its borders which it may determine to be deleterious to the health or good morals of its citizens?"

To this question we think there can be but one answer. The police power of the state has been defined by Chief Justice Shaw to be "the power invested in the legislature by the constitution to make, ordain and establish all manner of wholesale and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge for the good and welfare of the commonwealth and the subjects of the same."

Commonwealth vs. Alger, 7 Cushing, 53.

This court in the case of the *Beer Company vs. Massachusetts*, 97 U. S., 32, has enlarged and broadened the scope of this definition, and that, too, with reference to the very question involved in this case, by saying:

* * * and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquors; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. *If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state.*

If it be true that all rights are held "subject to the police power of the state," then it certainly must follow that the right to manufacture intoxicating liquors is within the control and the prohibitory power of the legislature, and "if the public safety or the public morals require its discontinuance," then "the hand of the legislature cannot be stayed from its discontinuance." No authority has been cited, no principle has been invoked, which imposes any limitation upon the exercise of the authority of the legislature when that authority seeks to exert itself in the restraint of what is harmful to its own people and within its own borders. The right of the

state is supreme to legislate for the protection of the public health and the promotion of the public good within the boundaries of its own territorial limits. Now it cannot be claimed that there is anything in the nature of the manufacture of intoxicating liquors which is extra-territorial, either in its scope or appliances. It is begun and ended within the state. If it be injurious in any respect the injury is purely local. Would it be claimed that because the product of the manufacture may be sold without the borders of the state, and therefore the manufactured article become the subject of commerce between the states, the constitution of the United States would project itself into the controversy and declare that such manufacture *must* be carried on, entirely oblivious of the injury to the health or the morals of the community in which the manufacturer might happen to be located? We think not. The question need only be asked to convey its own denial. When the constitution of the United States declares that congress shall have the power to regulate commerce among the several states, it does not intend to declare as a necessary result that congress has a right to impose upon the people of Iowa a manufacture which its own legislature has declared to be deleterious to the moral and physical health of its people. The powers of the general government and the powers of the several states have been happily likened to the celestial bodies, "each being and moving within its own orbit." The power of congress is supreme only in the field in which the fathers, by wise concession, for the establishment of a nation, gave it the power to act. Outside of that field and beyond the hedge which wise statesmanship and careful judicial construction will never ask to break down, lies the large and unquestionable authority of the state to legislate for the well-being of its people. It not only has the right, but it is in duty bound to provide, or as this supreme court has happily phrased it, "its hand cannot be stayed" from providing, for the

discontinuance of any manufacture, "if the public safety or the public morals require its discontinuance." And as was said in *Beer Company vs. Massachusetts, supra*:

> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there needs to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise.

In other words, it is to the legislature — the law-making power of the states — that the authority is confided in the first place of protecting the "lives, health and property of the citizens, and the presevation of good order and the public morals." And not only is the power confided to it, but it is its duty to exercise it, because, as the court has said, "it cannot even divest itself of the power by contract or otherwise." Not only does the state legislature have the power to do this, but it is also its *duty* to exercise it by providing for the attainment of its object "by such appropiate means as the legislative discretion may devise."

Counsel asks the question, "What is the difference between saying, 'You cannot export corn,' and 'You cannot raise corn for export?' There is no difference between a prohibition upon export and prohibition upon manufacture for export."

We think the question is easily answered. It is entirely competent for the state to prohibit the growth or the manufacture of any product or article whose growth or manufacture is deleterious to the public health or the public morals. If the growing of corn were attended with injurious results to the public health by reason of climatic conditions or otherwise, would it be seriously claimed that it is not competent for the legislature to prohibit it? Or, if the legislature should

determine that there were certain necessities for the use of corn, which, to a limited degree, outweighed the consideration of injury to health, might it not determine and so legislate that the growth of the product should be allowed, and allowed only, upon certain conditions and restrictions, and to a certain limited degree? Who has the right in this state, or any other, to demand that an article shall be produced or manufactured which is an injury to the people of the state? What right of commerce is higher than the legislative duty, as defined in the case last above cited? Is commerce of greater moment than morals? Is trade to be more tenderly regarded by law than the public welfare? Are the necessities of commerce to override the necessities of health, either of the soul or of the body? Dynamite, like alcohol, is property. Like alcohol, it is an article of commerce. The same laws protect it and the same constitutional provision shields it from unwarranted legislative intrusion. But because it is property and is an article of commerce, and may be manufactured in this state and exported therefrom, can it be said that its manufacture can not be regulated or denied, simply upon the ground that the denial of its manufacture would deny the right to export it? Is there anything in exportation, either as a principle or as a fact, which like the touch of Midas turns everything base with which it comes in contact into gold? Gunpowder is property. Gunpowder, like alcohol and like dynamite, is an article of commerce, but would it be claimed, because gunpowder when made may be and is exported into other states and there sold, that it is not competent for the legislature to say gunpowder shall not be manufactured at all? Or to say that it shall be manufactured only upon certain conditions and for certain uses? We claim in reference to the commodities instanced, and many others which might be suggested, that it *is* competent for the legislature of the state, if the public safety or the public morals require it, to absolutely prohibit their manufacture or growth.

Whether or not such prohibition may be wise, or whether or not the legislature may act upon a misconception of the requirements of the public safety or the public morals, is not for us to determine. Those are questions solely and exclusively for the consideration of the law-making power. The people must determine what is injurious to its health or its morals and that determination must become operative when the legislature speaks.

This principle was laid down by this court in the case of *Stone vs. Mississippi*, 101 U. S., wherein it is said that the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require," and that "for this purpose the largest legislature discretion is allowed *and this discretion cannot be parted with any more than the power itself.*

No controversy can arise upon the exclusive right of congress to regulate commerce between the states. The discussion of this question pursued with so much industry and learning by plaintiff's counsel, can have no controlling weight in determining the issue in this case. There is, perhaps, no doubt but the state of Iowa would have no right to impose any burdens upon alcohol or intoxicating liquors brought into this state for the purpose of sale which were not made to rest with equal weight upon those manufactured here for sale. We shall not consider or discuss the cases cited by which it is thought to establish this proposition. At the same time we claim that no authority has been exhibited which holds that the state cannot prohibit the manufacture for export and sale in other states of intoxicating liquors manufactured within its own borders.

The License Cases, reported in 5 Howard, 504, *et seq.*, determined substantially the question involved in this case. One of those cases, that of *Pierce vs. The State of New Hampshire*, involved the validity of the act of that state which provided a penalty for the sale of intoxicating liquors without a license.

Upon the trial it was proved that the liquors in question were purchased by the defendant in Boston, and brought thence into the state of New Hampshire, where they were sold by him without a license. The court held the fact the liquors in question were imported from the state of Massachusetts into the state of New Hampshire did not exempt them from the operation of the police laws of the latter state, and that such laws did not impose a restriction upon commerce between the states in a constitutional sense. The court says:

The word import, in a commercial sense, means the goods or other articles brought into this country from abroad—from another country. In this sense an importer is a person engaged in foreign commerce. And it appears that in the acts of congress which regulate foreign commerce, he is spoken of in that light. In *Brown vs. the State of Maryland*, 12 Wheat., 443, the court says the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States until he has purchased it from the state." And it was upon the ground that the tax was an additional charge or impost upon the thing imported, which a state could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one state to another. In some cases the transportation is only made a few feet or rods, and generally it is attended with little risk, and no duty is paid to the federal or state government. And why should property, when conveyed over a state line, be exempt from taxation which is common to all other property in the state?

There is no act of congress to which the license law as applied in this case can be held repugnant. And the general "power in congress to regulate commerce among the several states," under the restrictions in the constitution, can not affect the validity of the law. The constitution prohibits impost duties on a commercial interchange of commodities among the states. The tax, in the form of a license as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the state. The license system is a police regulation, and, as modified in the state of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society.

The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of *Brown vs. the State of Maryland.*

And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one state to another shall exempt it from taxation, and from general state regulation, it will not be difficult to avoid the police laws of any state, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the state, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the states which has been exclusively given to congress. One of the objects in adopting the constitution was to regulate this commerce and to prevent the states from imposing a tax on the commerce of each other. If this power has not been delegated to congress, it is still retained by the states and may be exercised at their discretion, as before the adoption of the constitution. For if it be a reserved power congress can neither abridge or abolish it.

But this barrel of gin, like all other property within the state of New Hampshire, was liable to taxation by the state. It comes under the general regulation and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire. I affirm the judgment of the state court.

The court here distinctly announces the doctrine that a police regulation designed to restrain and prevent immoral indulgencies was within the undoubted power of the state, notwithstanding its effect was to impose a burden upon commerce between the states. It distinctly denies the doctrine that the transportation of an article from one state to another invests that article in any such panoply as will shield it from the operation of the laws of the state into which it is transported; and the pertinent inquiry is made in the opinion just quoted, "Why should property when conveyed over a state line be exempt from taxation which is common to all other property in the state?"

The case of *The City of New York vs. Miln*, 11 Peters, 102, has long been accepted as a leading case in determining the limits to which the police power of the state may be extended. The statute construed in that case, notwithstanding it was admitted to impose a burden upon commerce, was held not to be

in conflict with the constitution of the United States. The court says:

> Now, if the act in question be tried by reference to the delineation of power laid down in the preceding quotations, it seems to us that we are necessarily brought to the conclusion that it falls within its limits. There is no aspect in which it can be used in which it transcends them. If we look at the place of its operation, we find it to be within the territory, and therefore within the jurisdiction of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York for whose protection and welfare the legislature of the state are authorized and in duty bound to provide.
>
> If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means by which these ends are proposed to be accomplished, they bear a just, natural and appropriate relation to those ends.

In like manner, the statute involved in this case is operative here, and the reasoning quoted above is equally cogent in support of our statute. The prohibition is only sought to be made within the territory of Iowa, and the enactment of it was for the people of this state, "for whose benefit and welfare the legislature of the state are authorized and in duty bound to provide." The legislation we seek to sustain may be assumed to have been adopted in indifference to its effect upon the people of other states. Their protection and their welfare are chargeable upon their own law givers. It is not the duty, possibly it may not not be the right, of the legislature of Iowa to shape its laws with any regard to their extra-territorial advantages and disadvantages. But it is the right of the legislature, as it is subject to the duty, to prohibit whatever may be detrimental to its own people, even though such prohibition may rest upon a manufacture of whose products the people of other states will thereby incidentally be deprived.

In *The Railroad Co. vs. Husen*, 95 U. S., 468, the supreme court discusses at length the extent and conditions to which and under which the police power of the state may be exercised. It says:

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. We admit that the deposit in congress of the power to regulate foreign commerce and commerce between the states was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive to domestic order, morals, health and safety. As was said in *Thorp vs. the Rutland & Burlington Railroad Co.*, 27 Vt., 149, "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It was further said that by the general police power of the state, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." It may also be admitted that the police powers of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the Passenger Cases, 7 How., 283, by Mr. Justice Greer, in the sacred law of self-defense. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state, for example, animals having contagious or infectious diseases. All these assertions of power are in immediate connection with the protection of persons and property against the noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of the state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. It was said in *Henderson et al. vs. Mayor of the City of New York, et al., supra*, to "be clear, from the nature of our complex form of government, that whenever the statute of a state invades the dominion of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to the powers conceded to belong to the state." Substantially the same claim was said by Chief Justice Marshall, in *Gibbons vs. Ogden*, 6 Wheat, 1. Neither the unlim-

ited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. *Many acts of a state may, indeed, affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects and influences and that which regulates or furnishes a rule for conduct.*

While this case does not assume to exactly define the limits of the police power of the state, which it distinctly says "it is difficult to define with sharp precision," it does nevertheless suggest and to some extent define the purposes and objects for which it may be exercised. It declares that the state may adopt precautionary measures against social evils; that it may legislate to prevent the spread of crime or pauperism or disturbances of the peace, and that it may pass laws which are necessary for the protection of life, liberty, health or property within its borders. This right is declared to rest upon the sacred law of self defense, and in the exercise of this right the state would be justified, upon the authority of this opinion, in the exclusion of property dangerous to the interests or the morals of the citizens of the state.

It should be remembered that it is not all legislation which affects commerce that amounts to a regulation of it. Many laws have an effect upon traffic which do not regulate it. The constitutional inhibition is construed by the courts as resting only upon the *regulation* of commerce. Laws falling short of this effect, and which in their operation and by their incidental results simply affect, without controlling, commerce between different states, cannot be said under any principle of construction to come within the purview of the constitutional inhibition. To influence trade is not to control it. We do not suppose it would be claimed that a law which in its immediate effect was proper, but which might remotely so affect the commerce in a particular article as to make it unprofitable, and therefore in effect prohibit it, would nevertheless come under the ban of the constitution,

even though the commerce therein were confined to different states.

The supreme court of Iowa, in a case involving this precise question (*State vs. Stucker*, 58 Iowa, 496), has said:

It is very clear that if the regulation or prohibition of the sale of intoxicating liquors is a police power, which may be exercised by the state and without interfering with the prerogative of congress to regulate commerce among the states, the act in question is not repugnant to article 1, section 8 of the federal constitution. Counsel for appellant cites *Ward vs. Maryland, 12 Wal., 418; Welton vs. Missouri. 91 U. S., 275*, and other cases in the same court, which hold that a license tax cannot be laid upon the sale of the products of other states while the same products within the state are exempted. *These cases are founded upon a different principle. They treat of regulations of commerce proper, and not with mere police regulations.*

In the case of *City of New York vs. Miln, supra*, this court lays down the doctrine that the state not only has undeniable and unlimited jurisdiction over all persons and things within its limits, where the same has not been expressly surrendered to the general government, but that it is also its duty to so legislate within these limits as to provide for the welfare of its people. It says:

But we do not place our opinion on this ground. We choose, rather, to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of the state is complete, unqualified and exclusive.

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically

so in relation to a subject so diversified and multifarious as the one which we are now considering.

If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a state or of any individual in it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction.

The claim of defendant in error could not be stated more broadly than it is in the extract just quoted. According to the doctrine of the opinion all rights of person and of property within the territorial limits of the state are held subject to the law making power of the state. If the manufacture of intoxicating liquors is a thing which can be bounded by the territorial limits of the state, and if the persons controlling the manufacture are within the jurisdiction of the state, then such manufacture is plainly subject to the law of the state. Upon the principal enunciated in this decision we are willing to rest our case.

In *Thurlow vs. The Commonwealth of Massachusetts*, 5 How., 586, one of the License Cases, Mr. Justice McLean discusses at length the police power of the state as applied to the regulation of the sale of intoxicating liquors. It was claimed that the act of Massachusetts imposing a license upon the sale of liquors was unconstitutional because it was alleged to be an interference with the right of congress to regulate commerce with foreign nations and among the several states. The court held the Massachusetts law to be constitutional and reasons as follows:

The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails being liable to communicate the disease, may be excluded, and, in extreme cases, it may be thrown into the sea. *This comes in direct conflict with the regulation of commerce, and yet no one doubts the local power.* It is a power essential to self-preservation, and exists, necessarily, in every organized community.

It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or *anything which contaminates its morals or endangers its safety*. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others.

From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry infectious disease; *yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation.* And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the state.

In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of cultivation, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exercised, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretence of police regulation, a state can not counteract the commercial power of congress. And yet, as has been shown, to guard the health, morals and safety of the community, the laws of the state may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. *Still it is clear that a law of a state is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case when the state regulation has a salutary tendency on society, and is founded on the highest moral consideration.*

The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments. The one operates upon our foreign intercourse; the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches and regulates it as it does other property. The state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it

taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell farm articles when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of a community, a state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publictions. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When in the appropriate exercise of these federal and state powers, contingently and incidentally their lines of action run into each other; if the state power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety and the moral energies of society, its prosperity is advanced.

In McCullough vs. the State of Maryland, 4 Wheat., 428, this court says: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the object to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general sufficient security against erroneous and oppressive taxation."

"The people of the state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against abuse."

But plaintiff claims that there is no limitation upon the right to manufacture intoxicating liquors except that which grows out of the limitation upon the sale. His argument asserts that the law "imposes no restrictions save such as inhere in the restraints upon the sale." He admits that the manufacture may

per se be the subject of regulation, but claims that in the case of this statute this is not the fact because, as we understand his position, there is nothing of danger or injury in the manufacture itself. It appears to us, however, that it is a sufficient answer to this claim to cite the legislative provisions upon the subject of manufacture. By way of reply to any assault upon the wisdom or policy of the law the maxim *ita lex scripta* is a sufficient argument. Who shall say the legislature of the state, with an eye single to the preservation of public morals, and with a steadfast purpose to banish from the state the manifold evils begotten by the existence of intoxicating liquors, did not determine that there was an evil inhering in the very manufacture of this dangerous element which it was determined to suppress? From what source can the argument be derived that, when the legislature declared there should be no sales of intoxicating liquors within the state except for mechanical, medicinal, culinary or sacramental purposes, or that there should be no manufacture of intoxicating liquors for any other than these purposes, as such purposes were made apparent by the wants and necessities of its own people, it did not mean precisely what it said? The thought may have been present in the legislative mind, and doubtless was, that there was danger to the public from the very presence of this product in its midst. To the weak and inconstant mind there is at least something of temptation in the very proximity of the evil to which it is prone. The perils of the use of intoxicating liquors lie not far removed from the possibilities of the use. It may have concluded that to permit the manufacture of intoxicating liquors for export might increase the facilities for evading the law with respect to domestic sales. It may have reasoned that the legalizing of the means to do a thing in Illinois or New York which the law declared to be absolutely wrong here would weaken public sentiment at home, and dull its moral sense with respect to the very evil it attempted to suppress; and so it may have concluded for these reasons to

amend, strengthen and make more rigorous the prohibition upon the manufacture of intoxicating liquors by declaring that this state should not be a place of refuge for him who sought to make gain by creating the means of gratification anywhere for the most dangerous of appetites. It may have determined that it would be debasing the moral sense of its own people and inflicting a consequent injury to the public welfare if it should throw the mantle of protection around an industry whose products it forbade its own people to expose for sale, while it allowed them to be sold to the rest of the world.

All this and much more, doubtless, did suggest and control the legislative purpose which found expression in the statute declaring not only that the sales of intoxicating liquors in the state should be limited to the four enumerated purposes, which a due regard to recognized necessities rendered necessary, but also that all manufacture should be limited to a like extent and in a like degree.

In our judgment it is not enough in answer to this to say: "If in the mere existence of a distillery there was peril, it would be provided against by seclusion. If, in the process of distillation there was physical harm to employes, precautionary measures would be adopted; if moral harm, some restriction upon the age, habits or character of the persons employed." We say it is not a sufficient answer, because the legislature has gone further and made a more emphatic declaration than plaintiff has suggested. The legislature has not merely provided for the seclusion of the distillery, it has in effect provided for its ban ishment; it has not been content to say that the distillery should exist and that the process of distillation might go on under certain restrictions with regard to "age, habits or character of the persons employed;" it has declared in effect that the distillery was an evil not to be tolerated within the territorial borders of the state, save under the severest restrictions and in obedience to the most urgent necessities. Those necessities, too, are not

the necessities of people in other states, which the legislature might properly assume would be met by the legislatures of those states, but by the necessities of its own people; and when those necessities, hedged about by all the safeguards which a wise philanthropy could suggest or a prudent statesmanship could devise have been fully provided for, then and beyond that there should be no manufacture of intoxicating liquors within the state.

III.

It is insisted by plaintiff in error that the Iowa statute in question contravenes the fourteenth article of amendment to the constitution, which enacts, "Nor shall any state deprive any person of life, liberty or property without due process of law." We do not deem it necessary to consider at length this assignment of error. This court has passed upon this precise question in the case of *Mugler vs. the State of Kansas, supra.* In the opinion in that case the court considered at length the case of *Pumpelly vs. the Green Bay Company*, 14 Wal., 177, which seems to be plaintiff's chief reliance in this branch of his case, and held that it did not sustain the principle contended for.

Admitting that the distillery in question is property, and even admitting that its use for any other purpose would be less profitable to the owner than for the purpose of distilling, it nevertheless remains that it is competent for the state to prohibit its use for any purpose inimical to the public health or the public morals. As was so well said in the *Mugler* case:

> A prohibition merely upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or the appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of its property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. * * * We are unable to perceive anything in these regulations inconsistent with the constitutional guarantees of liberty and property. The state hav-

ing authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

We claim, therefore, that the statutes in question are neither an encroachment upon the powers of the general government nor an unlawful taking of private property without due process of law. They were enacted by the legislature of the state in obedience to the demands of the people for protection against a great evil, and in discharge of the highest functions of the state. That the sovereign will of the people thus expressed shall be nullified and for the benefit of a single individual a dangerous manufacture forced upon a reluctant people we cannot believe to be within either the letter or the spirit of the fundamental law of the land.

JOHN S. RUNNELLS,
C. C. COLE,
Of Counsel for Defendants in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD, *Plaintiff in Error,*

vs.

I. E. PEARSON AND S. J. LOUGHRAN,

Defendants in Error.

STATEMENT AND ARGUMENT FOR THE DEFENDANT IN ERROR.

COLE, McVEY & CLARK,

Counsel for Defendants in Error.

ing authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

We claim, therefore, that the statutes in question are neither an encroachment upon the powers of the general government nor an unlawful taking of private property without due process of law. They were enacted by the legislature of the state in obedience to the demands of the people for protection against a great evil, and in discharge of the highest functions of the state. That the sovereign will of the people thus expressed shall be nullified and for the benefit of a single individual a dangerous manufacture forced upon a reluctant people we cannot believe to be within either the letter or the spirit of the fundamental law of the land.

JOHN S. RUNNELLS,
C. C. COLE,
Of Counsel for Defendants in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD, *Plaintiff in Error.*

VS.

I. E. PEARSON AND S. J. LOUGHRAN,

Defendants in Error.

STATEMENT AND ARGUMENT FOR THE DEFENDANT IN ERROR.

COLE, McVEY & CLARK,

Counsel for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1887.

JOHN S. KIDD,
Plaintiff in Error,

vs.

I. E. PEARSON AND
S. J. LOUGHRAN,
Defendants in Error.

Writ of Error to the Supreme Court of Iowa.

COLE, McVEY & CLARK, *Counsel for Defendants in Error.*

STATEMENT AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The original case herein was a suit in equity, brought in the district court of Polk county, by the defendants in error, under the prohibitory laws of Iowa, against the plaintiff in error, to enjoin the further illegal manufacture and sale of intoxicating liquors. Upon the trial in the district court, the relief asked by

the plaintiffs in the suit was granted. The defendants therein appealed to the supreme court of Iowa, where the judgment of the district court was affirmed. From that judgment the defendant therein has prosecuted this writ of error.

ARGUMENT.

I.

There is no Federal question involved—certainly none decisive of the case.

The facts upon which the case rests were stated fully in the original pleading filed, the essential basis of which is embraced in this paragraph:

"That the defendants have been, since the 4th day of July, 1884, and are now, engaged in the said manufacture of the said intoxicating liquors upon said premises for other than for mechanical, medicinal, culinary and sacramental purposes, to wit, for use as a beverage."

To this the defendant in said original case filed an answer, first, in general denial, and second, as follows, to wit:

"2. For a further defense to said petition defendant says that he is now, and ever since the 4th day of July, 1884, has been, authorized by the Board of Supervisors to manufacture and sell intoxicating liquors, except as prohibited by law, and that in the manufacture and sale of liquors this defendant has at all times complied with the requirements of law in that behalf."

From these brief extracts found in the original pleadings, and which constitute substantially the issue therein, it will be seen that the plaiutiff in error, himself, relies upon the permit granted him by the Board of Supervisors, authorizing him under the law of Iowa to manufacture intoxicating liquors. He claims the benefit and protection afforded by the statute, under which he has obtained his authority; and by virtue of the authority and permission thus obtained, under the statute of Iowa, he claims the right to manufacture intoxicating liquors, and claims that he has

done and is doing the same pursuant to said statute. Both the district court and the supreme court of Iowa found and held that he was not so exercising the permission and authority given him. This court will observe that the plaintiff in error did not, by his pleadings, claim a right contrary to, or notwithstanding the statute; but he claims the rights which he was exercising, under and pursuant to the statute. Having asserted his rights under the statute, and having failed to maintain them thereunder, he now seeks to repudiate his pleadings, and to assert and maintain a right in violation of, and in opposition to the statute. This is not a case where the issues are broad enough to raise by argument or otherwise, the question of the unconstitutionality of the statute, but where the plaintiff in error by his own pleading claims a right under and pursuant to the statute, whereby we submit he is estopped from now asserting a right contrary, and in the face of his own pleading of record.

Again, the evidence in the case shows that the plaintiff in error, under a statute of Iowa, presented his petition, signed by a majority of the legal electors of the ward in which he desired to manufacture intoxicating liquors, asking that a permit to manufacture, etc., be granted him; that accordingly upon his application, and upon the execution of the proper bond it was ordered:

"That he (John S. Kidd) be, and is hereby permitted to manufacture, buy and sell intoxicating liquors, for mechanical, medicinal, culinary and sacramental purposes only."

It further appears from the evidence that the plaintiff in error manufactured intoxicating liquors in large quantities, claiming to do so under the permit obtained as aforesaid from the Board of Supervisors of Polk county, and, as per his admission of record:

"That all sales not made through this agency were made upon the orders of customers from without the state, sent by mail or telegraph, and shipment was made to the persons ordering the liquors, a draft for the amount forwarded, with the bill of lading attached, the liquors to be delivered to the purchaser at his place of business without the state, on payment of the draft."

The testimony of the witness, J. G. Rounds, cashier of the Citizens' National Bank, modified this admission of record, as will appear by the following extract from his testimony:

"Our bank makes advances to him (plaintiff in error) on bills of lading. He comes to us with a draft on a party in New York, and in connection with the draft presents a bill of lading attached to the draft. The bill of lading is for alcohol. We advance him the amount of the draft, less our charges for collection, and send the draft to our correspondent in New York, or whatever other place he has shipped to, for collection. The drafts have always been honored, and paid when presented. We have taken drafts on other places than New York. * * * * The drafts were in the usual form, payable at two or three days sight. I do not recollect that there were any conditions annexed to the drafts. There were no conditions to the effect that merchandise would not be delivered until the bill was paid, unless it would be in our instructions in the matter. There were no conditions in the bill of lading. When Mr. Kidd comes to us with one of these drafts we pass it to his credit, less interest and exchange, and send the draft on. The draft ordinarily was at two or three days sight."

A section of the statutes of Iowa bearing upon the questions involved herein is as follows:

"SEC. 1537. No person having a permit to sell intoxicating liquors under this chapter, shall sell the same at a greater profit than thirty-three per cent on the cost of the same, including freights, and every person having such permit shall make, on the last Saturday of every month, a return in writing to the auditor of the county, showing the kind and quantity of the liquors purchased by him since the date of his last report, the price paid, and the amount of freights paid on the same; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, *for what purpose*, and what price, also the kind and quantity of liquors remaining on hand, which report shall be sworn to by the person having the said permit, and shall be kept by the auditor subject at all times to the inspection of the public; and the provisions of this section shall apply to persons holding a permit to manufacture intoxicating liquors, so far as the same relates to the report; and any such manufacturer shall within the time specified for parties holding a permit to sell, also report the quantity and kind of liquors by him manufactured since the date

of his last report, and also the quantity and kinds of liquors sold by him, and *for what purpose*, and to whom sold."

The monthly reports made by the plaintiff in error did not show, as required by the statute and the form of the report, for what purpose the purchasers of these liquors bought them.

Upon the admission of record as above, the testimony of the witness Rounds, and the monthly reports, the court found that the intoxicating liquors manufactured by the plaintiff in error had been sold for purposes other than those allowed by law, and therefrom concluded that the manufacture was illegal, and granted the injunction. Such finding of the court is sufficiently and abundantly sustained, and hence the injunction was properly granted, and this, too, without reference to the question of export. That is to say, the plaintiff in error having sold in the state of Iowa liquors, manufactured by him for purposes other than those specified by the statute, rendered himself and his establishment liable to be rightfully enjoined, as was done in this case, even if the right to manufacture for export should be conceded to its fullest extent. There is, therefore, no Federal question here, since regardless of whether the court below held for or against the right of export, its judgment must be affirmed. Although the court below may have held that the Iowa statute denied the right to manufacture in Iowa intoxicating liquors for export, yet the plaintiff in error was not prejudiced thereby, since the same judgment must have been entered by the court below upon the admitted testimony in the case, regardless of such holding.

We submit, therefore, that there is no such Federal question involved in this case as will give to this court jurisdiction.

II.

The prohibitory statute of Iowa is but an exercise of police power—It does not regulate commerce, but at most can only affect it.

In all of the multiplied cases involving the prohibitory laws of various states, which have been determined by this court, the

enactment of such laws has been held a legitimate and rightful exercise of the police power of the states. We need not cite the cases. They are too familiar to court and counsel, and too uniform in their holdings, to require more than this simple statement respecting them.

In speaking of the police powers of the states, this court said in *Fertilizing Co. vs. Hyde Park*, 97 U. S., 659, *i. e.* 667:

"We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another."

In *Beer Co. vs. Massachusetts*, 97 U. S., 25 i. e. 33 it is said that:

"As a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to *any* clause of the constitution of the United States."

And in *Foster vs. Kansas*, 112 U. S., 201 i. e. 206, this court in unmistakable language held:

"That the question as to the constitutional power of a state to prohibit the manufacture and sale of intoxicating liquors was no longer an open one."

The power of states to prohibit the manufacture and sale of intoxicating liquors is plenary. It is an exercise of the police power, a power which existed in the states originally, and which lies at the foundation of all government. This power was neither granted to the states, nor were their powers therein limited by the constitution of the United States, it exists, therefore, in all its primitive force, and unlimited scope, in all the states.

The power to prohibit or regulate the manufacture and sale of intoxicating liquors, being confessedly a police power, if it be exercised in good faith and for police purposes, such exercise of the

power cannot be defeated, even by showing that it trenches upon the constitutionally guaranteed rights of the person, or right of property, or may affect the constitutional power of congress over inter-state commerce, and this because the police power is original, fundamental and plenary, and its rightful and legitimate exercise may and often does operate to limit or affect the rights of persons, of property and of commerce.

It was said by Mr. Justice Grier in the License Cases, 5 Howard, 504, which involved the prohibitory statutes of three New England states, as follows:

"It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and *all measures of restraint or prohibition necessary to effect the purpose* are within the scope of that authority."

It was said by this court in *Railroad Co. vs. Husen*, 95 U. S., 465, which is quoted from very liberally by counsel for the plaintiff in error, among other things, and while especially referring to what was said by Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat., 1:

"Neither the unlimited powers of a state to tax, nor any of its large police powers can be exercised *to such an extent* as to work a practical assumption of the powers properly conferred upon congress by the constitution. Many acts of a state *may, indeed, affect commerce* without amounting *to a regulation of it* in the constitutional sense of the term. * * * * The police power of a state cannot obstruct foreign commerce or interstate commerce, *beyond the necessity for its exercise;* and under the color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution."

These quotations show that the right of a state to the full exercise of the police power, if such power be exercised in good faith for rightful police purposes, is valid, and will be upheld, although it may operate as a restraint upon commerce, if it is not beyond

the necessity for its exercise, and is not to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution.

The levy of a writ of attachment or of an execution, issued upon a judgment in a state court, by the sheriff of a county, upon a car load or train load of freight, shipped by a debtor at Des Moines to be carried to Chicago, would operate an entire defeat of the inter-state commerce to which that freight had been devoted by the debtor. But surely it cannot be said that the authorization of such a levy is violative of the power to regulate commerce, committed by the constitution to congress. And this, too, although such levies should be multiplied indefinitely, and should operate wholly to defeat all commerce in connection with the goods so levied upon. This proposition is too clear to require argument. It is not a regulation of commerce, although it affects commerce and operates to entirely defeat commerce in respect of such goods. The levy is rightful, and the stoppage of the goods rightful, although the power of congress over inter-state commerce in respect to them is defeated. In the recent cases determined by this court of *Mugler vs. Kansas*, 123 U. S., 623, it is in effect held that the enactment of a statute limiting the manufacture or sale of intoxicating liquors, was a rightful exercise of the plenary police power, committed to the states, although in those cases such enactment did limit the rights of the person, in-so-far as to prohibit him from the manufacture of beer for his own use, and although it did so affect the right of property of the individual in his brewing establishment, as to materially diminish its value. Upon these cases, as we understand them, the statute involved in this case must be held a valid and competent exercise of the police power. And this, because if a statute is valid which does limit or restrain a constitutionally guaranteed personal right, and operates to diminish the extent or value of a constitutionally guaranteed property right, when enacted in the good faith exercise of the police power, *a fortiori*, such a statute must be valid when it

simply affects the constitutional power of congress over inter-state commerce.

Indeed, it seems to us that in the cases referred to, although the opinion expressly reserved the question now under discussion from decision, yet the language, argument and citations of the opinion fully cover the question involved in this case. It is said in that opinion:

"It is, however, contended that although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits for general use as a beverage, 'no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export or storage, any article of food or drink not endangering or affecting the rights of others.'"

In answer to this contention this court says:

"If such manufacture does prejudicially affect the rights and interests of the community, it follows from the very premises stated that society has the power to protect itself by legislation against the injurious consequences of that business. * * * * * But by whom, or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites and passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals and public health, or the public safety."

And this court held that it was a rightful and proper exercise of that power to deprive a person of the right claimed under the constitution, to manufacture beer for his own personal use. It seems to us that the constitutional right of a person to thus manufacture for his own use, is quite as high and calls as loudly for judicial interference for the purpose of protecting such rights, as the right

to manufacture the same article for the purpose of transporting it by inter-state commerce to another state for the use of another there. It seems to us, further, that to deny to an individual under an act of a state legislature, the right to manufacture an article within the state for his own use as a food or drink, and then to affirm that such person had a right to manufacture the same article for the use of another, as a food or drink, provided that other should receive it through the avenues of inter-state commerce, would be an inversion of the pyramid of constitutional rights. But this court announces the proposition with more force, as well as with supreme authority, when it says:

"If, therefore, a state deems the absolute prohibition of the manufacture and sale, wlthin her limits, of intoxicating liquors for other than medicinal, scientific and mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. * * * * And so, if in the judgment of the legislature the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the court, upon their views as to what is best and safest for the community, to disregard the legislative determination of that qnestion. So far from such a regulation having no relation to the general end sought to bc accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use, as a beverage, were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determined that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. * * * * No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare."

In conclusion, upon this branch of our argument, we submit that the prohibitory law of Iowa is in no just sense a regulation of

commerce. The most that can be said is that it affects commerce by the exercise of the police power of the state in such proper and healthful restraint and limitation as the sovereign will may in good faith declare.

III.

The prohibitory laws of Iowa do not conflict with the power of Congress over inter-state commerce.

It is claimed by counsel for the plaintiff in error that intoxicating liquor is property in Iowa, and that it may be manufactured, held and owned as property. This claim or statement is not correct, we most confidently submit. It is property in Iowa only when it is manufactured, owned or kept for one of the specified purposes enumerated in the statute. When manufactured, owned or kept for any other purpose, it is not property. It has no attribute of property. It cannot be held as such because, unless it is held for one of these purposes it may be seized by an officer, and taken from the owner and destroyed. Code of Iowa, 1544–1557; *Funk vs. Israel*, 5 Iowa, 438, and other cases. If the owner of such liquor shall sell it to another upon credit or for cash, for a purpose not authorized by the statute, he cannot recover in an action for the consideration; *Davis vs. Slater*, 17 Iowa, 250; *Braitch vs. Guelick*, 37 Iowa, 212; and he is liable to be required upon action brought, to pay back to the purchaser the cash received in payment therefor; *Becker vs. Bettin*, 39 Iowa, 668; *Church vs. Simpson*, 25 Iowa, 408. Indeed the supreme court of Iowa has directly *held*, that one who, with permission to sell intoxicating liquors, purchases a quantity from a manufacturer without permission to sell, may not only set up the unlawful sale to defeat a recovery for the price of the same, but where he has made a payment thereon may recover the amount thus paid. See *Tolman vs. Johnson*, 43 Iowa, 127. Unless, therefore, the intoxicating liquor was manufactured, owned and kept for one of the specified pur-

poses, it is not property, and has no element of property in connection with it.

When we turn to the statute of Iowa we find that the plaintiff in error could not manufacture intoxicating liquor in Iowa, except he manufactured it for one of the four specified purposes. It must be manufactured for one of those purposes, or else no element or characteristic of property attaches to it. But confessedly, in this case, as appears by the argument of counsel for plaintiff in error, he did not manufacture liquor at his distillery in Iowa for either one of these four purposes, but for export, to be used for beverage or any other purpose. It follows, therefore, that when the intoxicating liquor was manufactured for any other purpose than those authorized by the statute, it did not have the element or characteristic of property, and did not, therefore, come within the range of commerce. It never attained the plane of a commercial article. It was contraband and valueless, and not property.

As we understand the argument of the counsel for the plaintiff in error, no question is made as to the power of the state to absolutely prohibit the manufacture of intoxicating liquors, but it is claimed that if the state allows the manufacture for any one purpose, and clothes the article manufactured for that purpose with the element of property, that therefrom arises the absolute right of every citizen to manufacture for any purpose, and to export that article so manufactured for any purpose other and different from those specified by the statute, if such manufacture is for the purpose of export. We submit that the argument is at fault in assuming that when manufactured for such contraband purpose, the intoxicating liquor becomes property. We have sought to meet this argument by showing that it can never become property, or have any element or characteristic of property in Iowa, unless manufactured for one of the purposes specified by the statute. We have done this, supposing that thereby the entire basis of the argument for the plaintiff in error must fail. If the article is not

property, no right to it can attach, nor can any right of commerce spring from it, or have connection with it.

But we desire to go further under this branch of our argument, and to affirm and show that under the prohibitory laws of Iowa, intoxicating liquor may not be manufactured within the state for any other than the named purposes, and to meet the necessary demands for those purposes of its own people. And this because, first, of the perils resulting to its own people by reason of and connected with the processes of its manufacture. That is to say, the inhibition upon the manufacture of intoxicating liquors is grounded not alone upon the uses to which such liquors may be applied after manufactured, but also upon the fact that connected with the processes of its manufacture, and to which those engaged therein are necessarily exposed, is the creation of an appetite for their use as a beverage, which appetite once formed has become the bane of the American people, more serious and far reaching than of any other people. That this appetite may be created or stimulated by engaging in the manufacture, in being necessarily present and inhaling the fumes during the processes, is, we submit, a physiological fact. Experience in connection with the distillery in question has most sadly exemplified this fact. It may be appealed to as a part of the history of our people in connection with such manufacturing, and as one of the unfortunate facts verified by the experience of mankind. It was competent, beneficent and statesmanlike for the legislature of Iowa to take this fact into consideration when enacting their prohibitory laws, and to allow such fact to control them in the determination that the people of Iowa should not be subjected to that ordeal, except so far as the actual necessities of the people of Iowa should require.

In this connection the court will note the care with which the legislature has limited the manufacture to the wants or necessities of its own people. It is provided by section 1539, which is copied on page four of the argument by counsel for plaintiff in error, that